All persons affected by this directive who have not already received the appropriate service information from the manufacturer may obtain copies upon request to Astra Jet Corporation, Technical Publications, P.O. Box 10086, Wilmington, Delaware 19850. This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 17900 Pacific Highway South, Seattle, Washington, or the Standardization Branch, 9010 East Marginal Way South, Seattle, Washington.

This amendment becomes effective May 18, 1990.

Issued in Seattle, Washington, on April 25, 1990.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 90-10183 Filed 5-1-90; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 89-ASW-40; Amdt. 39-6590]

Airworthiness Directives; Sikorsky Model S-58T Series Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) which requires inspection of the engine combining gear box/angle gear box drive shaft assembly for cracks and loose balance weights on Sikorsky Model S-58T series helicopters. The AD is needed to prevent failure of the engine combining gear box/angle gear box drive shaft assembly which could result in loss of the helicopter.

EFFECTIVE DATE: June 1, 1990.

ADDRESSES: The applicable service bulletin (SB) may be obtained from: Mr. R. E. Warren, Sikorsky Aircraft Division, United Technologies Corporation, North Main Street, Stratford Connecticut 06601, or may be examined in the Regional Rules Docket, room 158, Building 3B, between the hours of 8 a.m.and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Terry Fahr, Boston Aircraft Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7103.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an AD requiring an inspection of the engine combining gear box/angle gear box drive shaft assembly for cracks and loose balance weights on the Sikorsky Model S-58T series helicopters was published in the **Federal Register** on November 13, 1989 (54 FR 47217).

The proposal was prompted by two reported incidents of loose balance weights on the engine combining gear box/angle gear box drive shaft on S-58T series helicopters. One of the incidents resulted in a fatigue crack of the drive shaft. Since this condition is likely to exist or develop on other helicopters of the same type design, an AD is being issued which requires inspection, and removal, if necessary, of the engine combining gear box/angle gear box drive shaft assembly of these helicopters.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received. Accordingly, other than clarifying and combining the note paragraph following paragraph (b)(1) into the text of paragraph (b)(1), the proposal is adopted without change.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation involves 41 helicopters, and the approximate cost would be $240 per helicopter for a total potential cost impact of $9,840. Therefore, I certify that this action: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal; and (4) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

Sikorsky Aircraft: Applies to Model S-58T series helicopters, certificated in any category. (Docket No. 89-ASW-40)

Compliance is required as indicated, unless already accomplished.

To prevent failure of the engine combining gear box/angle gear box drive shaft assembly, part number (P/N) 58350-10030-045, which could result in loss of the helicopter, accomplish the following:

Within the next 50 hours' time in service after the effective date of this AD, inspect the engine combining gear box/angle gear box drive shaft assembly for cracks and loose balance weights as follows:

(a) Remove the engine combining gear box/angle gear box drive shaft assembly from the helicopter.

(b) Check the engine combining gear box/angle gear box drive shaft assembly for loose balance weights and a gap at the riveted joint between the balance weight and shaft as follows:

(1) Using a feeler gage, check for a gap greater than 0.002 inch in the immediate area of the attaching rivets which secure the balance weights to the shaft. On balance weights which require two rivets, do not check at the mid-span where an acceptable gap may exist.

(2) If a gap greater than 0.002 inch exists in the immediate area of the riveted joint, remove the engine combining gear box/angle gear box drive shaft assembly from service and reinstall an airworthy part in accordance with the standard maintenance instructions.

(3) If the gap at the rivets is 0.002 inch or less, further inspect the engine combining gear box/angle gear box drive shaft assembly as follows:

(i) Mask off an area on the engine combining gear box/angle gear box drive shaft assembly about 0.5 inch from all sides of the balance weights.

(ii) Remove the protective finish, paint, and primer from the engine combining gear box/angle gear box drive shaft assembly using paint remover, MIL-R-81294 or equivalent.

(iii) Remove the masking tape from the engine drive shaft assembly.

(iv) Clean the surface with methyl ethyl ketone, Federal Spec. TT-M-261 or equivalent.

(v) Fluorescent-penetrant-inspect the cleaned area in accordance with MIL-I-6866, Type 1, Method C, or equivalent.

(vi) If any cracks are found, remove the engine combining gear box/angle gear box drive shaft assembly from service and reinstall an airworthy part in accordance with the standard maintenance instructions.

(vii) If no cracks are found, remove the developer background used in the fluorescent

penetrant inspection. Use a blacklight to aid in complete removal of the developer.

(viii) Apply two coats of AMLGUARD, in accordance with MIL–C–85084 (TS), Type 1, or equivalent, over all the surfaces in the inspection area. Allow a ½-hour drying time between coats.

(c) Install the engine combining gear box/angle gear box drive shaft assembly on the helicopter in accordance with standard maintenance instructions.

Note: This AD contains material from Sikorsky Alert Service Bulletin No. 58B35–30, dated May 17, 1989.

(d) The aircraft may be ferried in accordance with the provisions of FAR §§ 21.197 and 21.199 to a base where compliance can be accomplished.

(e) An alternate method of compliance or adjustment of the compliance times, which provides an equivalent level of safety, may be used if approved by the Manager, Boston Aircraft Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, 12 New England Executive Park, Burlington, Massachusetts 01803.

Note: The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the manager of the Boston Aircraft Certification Office.

This amendment becomes effective on June 1, 1990.

Issued at Fort Worth, Texas, on April 25, 1990.

James D. Erickson,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 90–10184 Filed 5–1–90; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200 and 230

[Release No. 33–6863; 34–27942; IC–17458; File No. S7–7–90; International Series Rel. No. 122]

RIN 3235–AD23

Offshore Offers and Sales

AGENCY: Securities and Exchange Commission.

ACTION: Final rules, rule amendments and solicitation of comments.

SUMMARY: The Securities and Exchange Commission (the "Commission") is announcing the adoption of Regulation S to clarify the extraterritorial application of the registration provisions of the Securities Act of 1933. Regulation S provides generally that any offer or sale that occurs within the United States is subject to section 5 of the Securities Act and any offer or sale that occurs outside the United States is not subject to section 5. Additionally, the Regulation provides two "safe harbors" for specified transactions. Offers and sales meeting all of the conditions of the applicable safe harbor are deemed to be outside the United States and, therefore, not subject to section 5. The Regulation is not available with respect to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to register under the Investment Company Act of 1940. The Commission is soliciting comment regarding whether to extend the application of the Regulation to offers and sales of securities issued by registered mutual funds and unit investment trusts and, if so, the method by which to accomplish such extension.

DATES: *Effective date:* May 2, 1990, except that offerings of securities commenced on or prior to the ninetieth day following publication in the **Federal Register** may proceed under Securities Act Release No. 4708 and related no-action and interpretive letters.

Comments on the application of the Regulation to offers and sales of securities issued by investment companies should be received on or before June 25, 1990.

ADDRESSES: All communications on this matter should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments should refer to File No. S7–7–90. All comments will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

FOR FURTHER INFORMATION CONTACT: Anita Klein, Office of International Corporate Finance, (202) 272–3246, Division of Corporation Finance, or (with respect to solicitation of comments regarding offerings of certain mutual fund and unit investment trust securities) Kenneth J. Berman, Office of Disclosure and Investment Adviser Regulation, (202) 272–2107, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Table of Contents

I. Executive Summary

On June 10, 1988, the Commission published for comment Regulation S,[1] which was intended to clarify the extraterritorial application of the registration requirements of the Securities Act of 1933 (the "Securities Act").[2] The proposed Regulation contained both a general statement providing that the registration requirements do not apply to offers and sales that occur outside the United States, and two non-exclusive safe harbors from those requirements for specified offers and sales.

After reviewing the comments received,[3] which supported the

[1] Securities Act Release No. 6779 (June 10, 1988) [53 FR 22661] (the "Proposing Release"). The Proposing Release and the regulations as set forth therein are hereinafter referred to as the "initial proposal."

[2] 15 U.S.C. 77a *et seq.*

[3] Ninety-five comment letters on the initial proposal were received. Those letters and a summary of the comments are available for public inspection and copying in File No. S7–9–88 at the Commission's Public Reference Room in Washington, DC.

Regulation's rationale but suggested changes to increase the utility of the Regulation, the Commission published a revised Regulation S for comment on July 11, 1989.[4] While many aspects of the Regulation remained the same, some significant changes from the initial proposal were reflected in the reproposal. The primary result of the changes, giving further recognition to the doctrine of comity and the territorial approach to the application of Securities Act section 5, and reassessing the likelihood of flowback of foreign issuers' securities, was a reduction in the restrictions applicable to foreign issuers relying on the safe harbors. Generally, commenters on the Reproposing Release were strongly supportive of the reproposal, and suggested some further modifications.[5]

The Commission today is adopting Regulation S. As noted above, reliance upon Securities Act Release No. 4708 [6] (discussed below) and the no-action and interpretive letters relating thereto is not appropriate for offerings of securities commencing after the ninetieth day following publication of this release in the **Federal Register**. Offers and sales previously made in reliance upon no-action or interpretive letters are not adversely affected by the adoption of Regulation S.

As with the Proposals, the final Regulation consists of a general statement of applicability of the registration provisions (the "General Statement") and two safe harbors.[7] The General Statement provides that section 5 of the Securities Act [8] does not apply to offers or sales of securities that occur outside the United States.[9] In order for a transaction to fall within the provisions of the General Statement, both the sale and the offer relating to that sale must be made outside the United States. The General Statement no longer specifies the factors to be considered in determining the locus of the offer and sale.

As with the Proposals, Regulation S as adopted includes two safe harbors. One safe harbor applies to offers and sales by issuers, securities professionals involved in the distribution process pursuant to contract, their respective affiliates, and persons acting on behalf of any of the foregoing (the "issuer safe harbor"), and the other applies to resales by persons other than the issuer, securities professionals involved in the distribution process pursuant to contract, their respective affiliates (except certain officers and directors), and persons acting on behalf of any of the foregoing (the "resale safe harbor"). An offer, sale or resale of securities that satisfies all conditions of the applicable safe harbor is deemed to be outside the United States within the meaning of the General Statement and thus not subject to the registration requirements of section 5.

Two general conditions apply to the safe harbors. First, any offer or sale of securities must be made in an "offshore transaction," which requires that no offers be made to persons in the United States and that either: (i) The buyer is (or the seller reasonably believes that the buyer is) offshore at the time of the origination of the buy order, or (ii) for purposes of the issuer safe harbor, the sale is made in, on or through a physical trading floor of an established foreign securities exchange, or (iii) for purposes of the resale safe harbor, the sale is made in, on or through the facilities of a designated offshore securities market, and the transaction is not pre-arranged with a buyer in the United States. Second, in no event could "directed selling efforts" be made in the United States in connection with an offer or sale of securities made under a safe harbor. "Directed selling efforts" are activities undertaken for the purpose of, or that could reasonably be expected to result in, conditioning of the market in the United States for the securities being offered. Exceptions to the general conditions are made with respect to offers and sales to specified institutions not deemed U.S. persons, notwithstanding their presence in the United States.

The issuer safe harbor distinguishes three categories of securities offerings, based upon factors such as the nationality and reporting status of the issuer and the degree of U.S. market interest in the issuer's securities. The first category of offerings has been expanded from the Proposals and includes: securities offered in "overseas directed offerings," securities of foreign issuers in which there is no substantial U.S. market interest, securities backed by the full faith and credit of a foreign government, and securities issued pursuant to certain employee benefit plans. The term "overseas directed offerings" (which replaces "overseas domestic offerings" from the Reproposing Release) includes an offering of a foreign issuer's securities directed to any one foreign country, whether or not the issuer's home country, if such offering is conducted in accordance with local laws, offering practices and documentation. It also includes certain offerings of a domestic issuer's non-convertible debt securities, specified preferred stock and asset-backed securities denominated in the currency of a foreign country, which are directed to a single foreign country, and conducted in accordance with local laws, offering practices and documentation. The second category has been revised to include offerings of securities of U.S. reporting issuers and offerings of debt securities, asset-backed securities and specified preferred stock of foreign issuers with a substantial U.S. market interest. The third, residual category has been adopted substantially as reproposed.

The issuer safe harbor requires implementation of procedural safeguards, which differ for each of the three categories, to ensure that the securities offered come to rest offshore. Offerings under the first category may be made offshore under the issuer safe harbor without any restrictions beyond the general conditions. Offerings made in reliance on the other two categories are subject to additional safeguards, such as restrictions on offer and sale to or for the account or benefit of U.S. persons.

The resale safe harbor has been expanded from the Proposals to allow reliance thereon by certain officers and directors of the issuer or distributors. In such a transaction, no remuneration other than customary broker's commissions may be paid. Otherwise, the resale safe harbor is adopted substantially as reproposed. Under the resale safe harbor, dealers and others receiving selling concessions, fees or other remuneration in connection with the offering (such as sub-underwriters) must comply with requirements designed to reinforce the applicable restriction on directed selling efforts in the United States and the offshore transaction requirement. All other persons eligible to rely on the resale safe harbor need only comply with the general conditions.

The safe harbors are not exclusive and are not intended to create a presumption that any transaction failing

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[4] Securities Act Release No. 6838 (July 11, 1989) [54 FR 30063] (the "Reproposing Release"). The Reproposing Release and the regulations as set forth therein are hereinafter referred to as the "reproposal." The initial proposal and the reproposal of Regulation S are referred to collectively hereinafter as the "Proposals."

[5] Forty-four comment letters on the reproposal were received. Those letters and a summary of the comments are available for public inspection and copying in File No. S7-9-88 at the Commission's Public Reference Room in Washington, DC.

[6] Release No. 33-4708 (July 9, 1964) [29 FR 9828] ("Release 4708").

[7] The Regulation as adopted has been reorganized for purposes of clarity: Rules 903 and 905 of the reproposal have been deleted and their substance moved to adopted Rules 903 and 904.

[8] 15 U.S.C. 77e.

[9] "United States" is defined in Rule 902(p).

to meet their terms is subject to section 5.[10] Reliance on one of the safe harbors does not affect the availability of any exemption from the Securities Act registration requirements upon which a person may be able to rely.

Regulation S relates solely to the applicability of the registration requirements of section 5 of the Securities Act. The Regulation does not limit in any way the scope or applicability of the antifraud or other provisions of the federal securities laws or provisions of state law relating to the offer and sale of securities.

In contrast to the Proposals, the Regulation as adopted applies to offers and sales of securities issued by closed-end investment companies that are registered under the Investment Company Act of 1940 [11] in addition to investment companies that are not required to register under the 1940 Act. The Regulation is not applicable to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to register or closed-end investment companies required to register, but not registered, under the 1940 Act. Comment is solicited, however, regarding whether to extend the application of the Regulation to offers and sales of securities by registered mutual funds and unit investment trusts and, if so, the method by which to accomplish such extension.

At or around the time of adoption of this Regulation, the Department of the Treasury is adopting regulations establishing new procedures applicable to foreign-targeted offerings of bearer debt obligations. Persons contemplating issuance of such obligations in reliance on this Regulation are advised to direct their attention also to the Treasury regulations. *See* Treas. Reg. §1.163–5(c).

II. Background and Introduction

The registration requirements of the Securities Act literally apply to any offer or sale of a security involving interstate commerce or use of the mails, unless an exemption is available.[12] The term "interstate commerce" includes "trade or commerce in securities or any transaction or communication relating thereto * * * between any foreign country and any State, Territory or the District of Columbia * * *." [13] The Commission, however, historically has recognized that registration of offerings with only incidental jurisdictional contacts should not be required.[14] In Release 4708, the Commission stated that it would not take any enforcement action for failure to register securities of U.S. corporations distributed abroad solely to foreign nationals, even though the means of interstate commerce were used, if the distribution was effected in a manner that would result in the securities coming to rest abroad.[15]

Numerous procedures were employed after the issuance of Release 4708 to ensure that securities sold in reliance upon the Release were sold to non-U.S. persons and "came to rest" abroad. These procedures frequently were the subject of no-action letters issued by the Commission's staff.[16] The staff also construed Release 4708 to permit resales abroad of securities not acquired in reliance on the Release.[17] The staff did not express any view as to when or under what circumstances securities issued pursuant to Release 4708 could be resold in the United States or to U.S. persons. Rather, the staff indicated that resales could only be made in compliance with the registration requirements of the Securities Act or an exemption therefrom.[18]

The development of active international trading markets and the significant increase in offshore offerings of securities, as well as the significant participation by U.S. investors in foreign markets, present numerous questions under the U.S. securities laws. For companies raising capital abroad, a principal issue under the federal securities laws is the reach across national boundaries of the registration requirements under section 5 of the Securities Act.

The Regulation adopted today is based on a territorial approach to section 5 of the Securities Act.[19] The registration of securities is intended to protect the U.S. capital markets and investors purchasing in the U.S. market, whether U.S. or foreign nationals. Principles of comity [20] and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore.[21] The territorial approach recognizes the primacy of the laws in which a market is located. As investors choose their markets, they choose the laws and regulations applicable in such markets.

In view of the objectives of Regulation S and the policies underlying the Securities Act, the Regulation is not available for any transaction or chain of transactions that, although in technical compliance with the rules, is part of a plan or scheme to evade the registration obligations of the Securities Act.[22] In such cases, registration under the Securities Act would be required.

Regulation S relates solely to the applicability of the registration requirements of section 5 of the Securities Act, and does not limit the scope or extraterritorial application of the antifraud or other provisions of the federal securities laws [23] or provisions of state law relating to the offer and sale of securities.[24] The antifraud provisions have been broadly applied by the courts to protect U.S. investors and investors in U.S. markets where either significant conduct occurs within the United States (the "conduct" test) [25] or the conduct

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[10] *See* Preliminary Note 5 to Regulation S.

[11] 15 U.S.C. 80a *et seq.* (the "1940 Act"). *See* Preliminary Note 8 to Regulation S.

[12] Securities Act Section 5 [15 U.S.C. 77e]. *See Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972); *cf. SEC v. United Financial Group, Inc.*, 474 F.2d 354, 357 (9th Cir. 1973).

[13] Securities Act section 2[7] [15 U.S.C. 77b(7)].

[14] *Cf. IIT v. Vencap Ltd.*, 519 F.2d 1001, 1016 (2d Cir.) (1975), *quoting Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280, 282–283 (1972) (resolution of jurisdictional questions in the securities area "depends on construction of exercised congressional power not the limitations upon that power itself").

[15] Although Release 4708 specifically refers only to domestic issuers, the staff also has applied it to offerings by foreign issuers. *See, e.g., Vizcaya International N.V.* (Apr. 4, 1973); *Republic of Iceland* (Mar. 19, 1971).

[16] *See, e.g., InfraRed Associates, Inc.* (Sept. 13, 1985); *Procter & Gamble Co.* (Feb. 21, 1985); *Fairchild Camera and Instrument International Finance N.V.* (Dec. 15, 1976); *Raymond International Inc.* (June 28, 1976); *Pan American World Airways, Inc.* (June 30, 1975); *The Singer Company* (Sept. 3, 1974).

[17] *See, e.g., College Retirement Equities Fund* (Feb. 18, 1987); *WCRS Group, PLC* (Jan. 8, 1987); *Wordplex Information Systems, PLC* (Dec. 5, 1985); *Trilogy Resource Corporation* (Aug. 3, 1984).

[18] *See, e.g., Proctor & Gamble Co., supra*, n. 16.

[19] Territoriality is a fundamental basis for jurisdiction under both international law, D. Greig, *International Law* 210, 214 (2d ed. 1976), and the foreign relations law of the United States. Rest. 3rd. *Restatement of the Foreign Relations Law of the United States* section 402 (1987) ("Revised Restatement"); *Restatement Foreign Relations Law of the United States* section 10 (1965) ("Second Restatement"). *See also* W. Bishop, International Law 535 (1962); ALI Fed. Sec. Code section 905, Comments 3(b), 4 (1980) ("ALI Code").

[20] The doctrine of comity emphasizes restraint and tolerance by nations in international affairs. *See generally*, L. Oppenheim, I *International Law* 34 (H. Lauterpacht ed., 8th ed. 1955). *See also* I H. Lauterpacht, International Law 44–46 (1970); *Offshore Funds and Rule 10b–5: An International Law Approach to Extraterritorial Jurisdiction Under the Securities Exchange Act of 1934*, 8 Fordham Int'l L. J. 410 (1984–1985), *citing* Akehurst, *Jurisdiction in International Law*, 1972–1973 Brit. Y.B. Int'l L. 214–215; I. Brownlie, *Principles of Public International Law* 31 (3d ed. 1979).

[21] As stated in the Proposing Release, offers and sales made in Canada will be treated in the same way as those made in any other foreign jurisdiction.

[22] Preliminary Note 2 to Regulation S.

[23] *See* Preliminary Notes 1 and 3 to Regulation S.

[24] *See* Preliminary Note 4 to Regulation S.

[25] *E.g., SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); *IIT v. Vencap, Ltd.*,

Continued

occurs outside the United States but has a significant effect within the United States or on the interests of U.S. investors (the "effects" test).[26] It is generally accepted that different considerations apply to the extraterritorial application of the antifraud provisions than to the registration provisions of the Securities Act.[27] While it may not be necessary for securities sold in a transaction that occurs outside the United States, but touching this country through conduct or effects, to be registered under United States securities laws, such conduct or effects have been held to provide a basis for jurisdiction under the antifraud provisions of the United States securities laws.

III. Discussion of Regulation S

A. General Statement

Rule 901(a) is a general statement of the applicability of the registration provisions of the Securities Act. The General Statement provides that any offer, offer to sell, sale, or offer to buy that occurs within the United States is subject to section 5 of the Securities Act, while any such offer or sale that occurs outside the United States is not subject to section 5.[28] The determination as to whether a transaction is outside the United States will be based on the facts and circumstances of each case. If it can be demonstrated that an offer or sale of securities occurs "outside the United States," the registration provisions of the Securities Act will not apply, regardless of whether the conditions of the safe harbor are met. For a transaction to qualify under the General Statement, both the sale and the offer pursuant to which it was made must be outside the United States.

Unlike the Proposals, the General Statement does not list the factors to be considered in determining whether an offer or sale occurs outside the United States. Commenters expressed concern with regard to various aspects of the factors listed in the Proposals. In response to the Commission's request for comment in the Reproposing Release, a number of commenters recommended that the entire list of factors be deleted from the General Statement. Since the list was included in the Proposals to provide assistance to persons relying on the General Statement to demonstrate an offer or sale was made outside the United States, it has been deleted from the Regulation in light of the commenters' assessment that the list would not be helpful.

B. Safe Harbors

Rules 903 and 904 set forth non-exclusive safe harbors for extraterritorial offers, sales and resales of securities. The safe harbors include conditions to protect against indirect, unregistered, non-exempt offerings into the U.S. capital markets.

An offer or sale by an issuer, a distributor, an affiliate of either, or any person acting on behalf of any of the foregoing, that meets the applicable conditions of the issuer safe harbor (Rule 903) is outside the United States for the purposes of Rule 901. For purposes of the Regulation, the term "distributor" [29] includes all underwriters, dealers,[30] and other persons who are participating in a distribution of securities pursuant to contractual arrangements, such as sub-underwriters, but does not include persons participating pursuant to contract only in ancillary positions, such as fiscal agents or persons hired to perform clearing services.

Distributors and their affiliates are not prevented by the Regulation from engaging in secondary transactions in securities of the same class being distributed, provided the securities are not borrowed or replaced with shares from the offering. Once the distribution has ended and any applicable restricted period [31] specified in Rule 903 has expired, distributors that have sold their allotments will no longer have distributor status and therefore will be able to use Rule 904's resale safe harbor. So long as a distributor still holds some portion of its allotment, it will continue to be unable to rely on Rule 904 with respect to the offer and sale of the unsold allotment.[32]

The resale safe harbor is available for offers and sales by all persons except an issuer, a distributor, an affiliate of either (other than specified officers and directors), and any person acting on behalf of any of the foregoing. An offer or sale that meets the applicable conditions of Rule 904 is outside the United States for the purposes of Rule 901. Unlike the reproposal, resales of securities by officers and directors who may be affiliates of the issuer or distributor, and thus would have been ineligible to use the resale safe harbor, may be made in reliance upon that safe harbor provided specified conditions are met.[33] Of course, the resale safe harbor is not available for such officers and directors if they are being used as conduits to sell securities for persons ineligible to rely upon the resale safe harbor.

1. General Conditions

Two general conditions apply to all offers, sales and resales made in reliance on the safe harbors.[34] First, such an offer or sale must be made in an "offshore transaction." Second, no "directed selling efforts" may be made in the United States in connection with an offer or sale of securities in reliance on such safe harbors.

a. *Requirement of offshore transaction.* An "offshore transaction" [35] is a transaction in which no offer is made to a person in the United States and either of two additional sets of requirements is met.[36]

519 F.2d 1001 (2d Cir. 1975); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

[26] *E.g., Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977); *Schoenbaum v. Firstbrook*, 405 F.2d 200, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969).

The "conduct" and "effects" tests, either of which can independently support a finding of jurisdiction under the antifraud provisions of the federal securities laws, are derived from the Second Restatement. *See also* ALI Code section 1905.

[27] *Consolidated Gold Fields PLC v. Minorco, S.A.*, *supra* n. 26 at 262–263; *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974, 986 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) ("It is elementary that the antifraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets"); *see also IIT v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980); Johnson, *Application of the Federal Securities Laws to International Securities Transactions*, 45 Alb. L. Rev. 890, 925–926 (1981).

[28] *See* ALI Code, section 1905(a)–(b).

[29] Rule 902(c).

[30] The term "dealer," as defined in section 2(12) of the Securities Act [15 U.S.C. 77b(12)], encompasses those who engage in the business of securities trading or dealing as agent, broker or principal.

[31] "Restricted period" is defined in Rule 902(m).

[32] A distributor holding an unsold allotment of securities in a segregated identifiable account may sell as a nondistributor other securities of the same class, so long as such securities were not borrowed from and will not be replaced by securities that are part of the unsold allotment.

[33] *See infra* n. 138 and accompanying text.

[34] *See* Rules 903(a)–(b) and 904(a)–(b).

[35] Rule 902(i). The offshore transaction definition has been revised from the reproposal to make clear that offers specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the armed forces serving overseas, will be deemed made within the United States. *See* Rule 902(i)(2). Such targeted offerings also will be deemed to constitute directed selling efforts in the United States.

[36] *But see infra* n. 122 and accompanying text discussing offers and sales deemed to be made in "offshore transactions" to certain professional fiduciaries or multinational organizations in the United States who are defined not to be U.S. persons. Offers made in the United States in connection with contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors.

The first alternative requires at the time the buy order is originated, that the buyer be outside the United States (or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States).[37] The second alternative covers certain transactions executed in, on or through the facilities of a designated offshore securities market [38] (unless the seller or a person acting on its behalf knows that the transaction was pre-arranged with a buyer in the United States) and certain transactions executed in, on or through the physical trading floor of an established foreign securities exchange located outside the United States.

The first alternative focuses on the location of the buyer for two reasons. First, the location of the buyer overseas clearly and objectively provides evidence of the offshore nature of the transaction. The requirement that the buyer itself, rather than its agent, be outside the United States reduces evidentiary difficulties and problems in administering the Regulation, both for regulators and private parties attempting to ensure compliance with the conditions of the safe harbor. Second, the buyer's location outside the United States supports the expectation that the buyer is or should be aware that the transaction is not subject to registration under the Securities Act.

When the buyer is a corporation or partnership, if an authorized employee places the buy order while abroad, the requirement that the buyer be outside the United States will be satisfied.[39] When the buyer is an investment company, if an authorized person employed by either such company or its investment adviser places the buy order outside the United States, the requirement that the buyer be outside the United States will be satisfied.

The second alternative definition of "offshore transaction" provides that certain transactions executed in, on or through certain offshore securities markets are offshore transactions, without regard to the location of the person originating the buy order. In order to be considered a sale of securities in, on or through the facilities of an offshore securities market, the sale must be effected outside the United States under the auspices and supervision of such a securities market, by or through a member of such market or any other person authorized to effect such sales thereon.[40] Such execution of a transaction in a foreign marketplace provides objective evidence of the foreign locus of the transaction.[41] Moreover, buyers in such markets may be presumed to rely on the regulatory protections afforded by local law and not U.S. registration requirements.

The definition of "offshore transaction" has been revised in order to clarify that reliance on designated offshore securities market trading, where neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States, to satisfy the requirement was contemplated only for secondary trading under the resale safe harbor. Nevertheless, to accommodate the infrequent practice of conducting primary offerings (offerings by the issuer, a distributor, any of their respective affiliates, and any persons acting on behalf of any of the foregoing) on the offshore physical trading floors of established foreign securities exchanges, the definition also has been revised to allow satisfaction of the offshore transaction requirement by such primary offerings.[42]

For secondary trading under the resale safe harbor, the Regulation as adopted combines exchange and non-exchange markets within one term.[43] As adopted, "designated offshore securities markets" includes a list of seventeen foreign securities markets as well as any other organized foreign securities markets that may be designated subsequently by the Commission.

In order to qualify as a "designated organized foreign securities market" under the reproposal, a market had to be organized under foreign law, have an established operating history, and be overseen by a governmental or self-regulatory body to which securities transactions are reported on a regular basis. Commenters expressed concern that such factors would preclude certain organized foreign markets from qualifying. Each factor was supported by some commenters and criticized by others. As adopted, in addition to the list of foreign securities markets, the definition of designated offshore securities market refers to organized foreign markets and provides a non-exclusive list of attributes that will be considered by the Commission in designating such foreign markets.[44] The existence of all the listed attributes is not requisite to a designation and no single attribute is required. As stated in the Reproposing Release, designation of such organized foreign securities markets will be done on a case-by-case basis by the Commission [45] through the interpretive letter process.[46] The Commission will make its determination regarding designation upon consideration of all the facts pertaining to a particular market.

b. *Directed selling efforts.* A person making an offer or sale otherwise in accordance with the conditions of the issuer safe harbor will be unable to rely on the provisions of the safe harbor if any directed selling efforts are being made in the United States by an issuer,

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[37] Unlike the initial proposal, execution and delivery of the transaction outside the United States are not required in order to satisfy the first alternative definition of offshore transaction.

[38] Rule 902(a).

[39] There would be no need to consider where the investment decision leading to the transaction was made.

[40] Transactions in, on or through the facilities of a designated offshore securities market include all transactions reported to such market. Trades executed between sessions, reported to the exchange and included in exchange trading volume, will be deemed on that market.

[41] Through trading linkages, orders placed for execution on a foreign securities exchange may, in fact, be executed on a U.S. exchange. The one linkage that exists today, between the Montreal and Boston Stock Exchanges, is intended to provide only supplemental best execution capability in linkage stocks, and the transactions generally are executed in the market where the order is placed. For these reasons, transactions executed on a U.S. exchange by means of this trading linkage, as currently structured, will be deemed to have been executed on the Montreal Stock Exchange. The locus of transactions executed through trading linkages will be determined in the future by the nature of the linkage, the procedures used for order routing and the manner in which the linkage is used.

[42] *See* Rule 902(i)(1)(ii)(B)(*1*). *See also* Proposing Release discussion of "established foreign securities exchanges" (53 FR at 22669).

[43] The reproposal divided foreign markets by use of the terms "established foreign securities exchanges" and "designated organized foreign securities markets."

[44] Rule 902(a)(2).

[45] The Commission is delegating authority to the Division or Corporation Finance to designate the markets described in Rule 902(a)(2) in consultation with the Division of Market Regulation. The rule providing for delegation of authority to the Director of the Division of Corporation Finance (17 CFR 200.30–1) therefore is being amended by virtue of this release.

[46] The following markets are included within the definition of "designated offshore securities markets:" the Eurobond market, as regulated by the Association of International Bond Dealers; the Amsterdam Stock Exchange; the Australian Stock Exchange; the Bourse de Bruxelles; the Frankfurt Stock Exchange; The Stock Exchange of Hong Kong Limited; The International Stock Exchange of the United Kingdom and the Republic of Ireland, Ltd.; the Johannesburg Stock Exchange; the Bourse de Luxembourg; the Borsa Valori di Milan; the Montreal Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange. *See* Rule 902(a)(1). The list has been derived from those markets designated as ready markets under Rule 15c3–1 under the Exchange Act. Additional designations will be considered on request.

Commenters on the Reproposing Release suggested that foreign government securities markets be designated. Since more information about the aspects of those markets that give them a foreign locus is needed prior to designation, the Commission will consider such markets on a case-by-case basis under the designation process.

a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing.[47] With respect to resales under Rule 904, a directed selling effort by the seller, any of its affiliates, or any person acting on behalf of either, will preclude reliance on the resale safe harbor by that seller; directed selling efforts by any other person will not affect the seller's ability to rely on the resale safe harbor.

Under the issuer safe harbor, directed selling efforts in the United States may not be made during the period the issuer, the distributors, their respective affiliates or persons acting on behalf of any of the foregoing, are offering [48] and selling the securities and, for offerings under the second and third safe harbor categories, during the restricted period as well.

"Directed selling efforts" are those activities that could reasonably be expected, or are intended, to condition the market with respect to the securities being offered in reliance upon the Regulation. This provision precludes, *inter alia*, marketing efforts in the United States designed to induce the purchase of the securities purportedly being distributed abroad. Activities such as mailing printed material to U.S. investors,[49] conducting promotional seminars in the United States,[50] or placing advertisements with radio or television stations broadcasting into the United States or in publications with a general circulation in the United States, which discuss the offering or are otherwise intended to condition, or could reasonably be expected to condition, the market for the securities purportedly being offered abroad, constitute directed selling efforts in the United States.

Publications with a general circulation in the United States, as defined in the Regulation, include all publications printed primarily for distribution in the United States, and all publications that, on average during the preceding 12 months, have had a circulation in the United States of 15,000 copies or more per issue.[51] Where a foreign publication produces a separate edition that in itself has a general circulation in the United States, only the U.S. edition will be considered a publication with a general circulation in the United States if the affiliated non-U.S. editions together do not meet the definition when the U.S. edition is disregarded.[52]

The definition of directed selling efforts specifically excludes several forms of advertisements.[53] First, an advertisement will not be deemed a directed selling effort under the Regulation if publication of the advertisement is required by foreign or U.S. law or the rules or regulations of a U.S. or foreign regulatory or self-regulatory authority, such as a stock exchange, provided that the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Securities Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under the second or third issuer safe harbor categories) absent registration or an applicable exemption from the registration requirements.[54]

Second, to ameliorate the effect of the Regulation on a foreign publication's advertising practices where the United States accounts for a limited portion of its circulation, the definition of directed selling efforts excludes tombstone advertisements in a publication if less than 20% of its circulation, calculated by aggregating its U.S. and comparable non-U.S. editions,[55] is in the United States. To qualify, a tombstone advertisement must: (i) include a legend to the effect that the securities have not been registered under the Securities Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under the second or third issuer safe harbor categories) absent registration or an applicable exemption from the registration requirements; and (ii) include no more information than: the issuer's name; the amount and title of the securities being sold; a brief indication of the issuer's general type of business; the price of the securities; the yield of the securities, if debt securities with a fixed (non-contingent) interest provision; the name and address of the person placing the advertisement and whether such person is participating in the distribution; the names of the managing underwriters; the dates, if any, upon which the sales commenced and concluded; whether the securities are offered by rights issued to security holders and, if so, the class of securities entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and any legend required by law or any foreign or U.S. regulatory or self-regulatory authority.[56]

Distribution or publication in the United States of information, opinions or recommendations concerning the issuer or any class of its securities could constitute directed selling efforts, depending upon the facts and circumstances.[57] Directed selling efforts will not be deemed to exist, however, if the information, opinion or recommendation of a distributor or its affiliate with respect to a reporting issuer:[58] (i) Is contained in a publication that is distributed with reasonable regularity in its normal course of business, and includes similar information, opinions or recommendations in that issue with respect to a substantial number of companies in the issuer's industry or sub-industry, or contains a comprehensive list of securities recommended by such entity; (ii) is given no materially greater space or prominence in such publication than that given to securities of other issuers; and (iii) with respect to an opinion or

[47] *But see infra* n. 121 and accompanying text discussing contacts deemed to be excluded from the definition of "directed selling efforts" with certain professional fiduciaries or multinational organizations in the United States who are defined not to be U.S. persons. Offering activities in contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors.

[48] Once directed selling efforts are begun, offers of the securities necessarily will have commenced, if not before.

[49] *Cf. In the Matter of First Maine Corp.*, 38 SEC 882 (1959) (Advertisements including information regarding prospective offerings violated section 5(c) of the Securities Act) [15 U.S.C. 77e(c)]; *SEC* v. *Commercial Investment and Development Corporation of Florida*, 373 F. Supp. 1153 (S.D. Fla. 1974) (Newsletter distributed to existing shareholders touting a proposed public offering violated section 5(c) of the Securities Act).

[50] *Cf. SEC* v. *The Firestone Group, Ltd* [1969–70 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,728 at 99,191 (D.D.C. 1970) (Promotional seminars conducted in violation of section 5(c) of the Securities Act).

[51] *See* Rule 902(k)(1).

[52] *See* Rule 902(k)(2).

[53] Activities specifically excluded from the definition of directed selling efforts also will not be deemed offers in the United States for purposes of the Regulation.

[54] Rule 902(b)(2).

[55] The *Financial Times*, for example, publishes an international edition that circulates in the United States and a "comparable" U.K. edition. The U.K. and international editions are comparable in that the only differences between them are that pages of news items of primarily local interest in the U.K. and multi-page prospectuses directed solely to U.K. residents are removed from the international edition and minor textual changes are made from the U.K. edition to clarify references for international readers. Thus, the circulation of the international edition and the circulation of the U.K. edition would be aggregated.

[56] *See* Rule 902(b)(4). Such information is similar to information that would be permitted for advertisements made in compliance with Rule 134 under the Securities Act [17 CFR 230.134].

[57] Such activity also could be deemed as offer in the United States which would violate the offshore transaction requirement.

[58] "Reporting issuer" is defined in Rule 902(*l*).

recommendation, is no more favorable to the issuer than the opinion or recommendation published by the entity in its last issue addressing the issuer or its securities.[59] When the issuer is not a reporting issuer, the effect on the market of publication or distribution of information, opinions or recommendations about the issuer or its securities can be expected to be more significant due to the possible absence of other publicly available information about the issuer. Distributors and their affiliates should exercise even greater caution in publication or distribution of information, opinions or recommendations concerning non-reporting issuers or their securities.

An isolated, limited contact with the United States generally will not constitute directed selling efforts that result in a loss of the safe harbor for the entire offering.[60] The Regulation likewise is not intended to inhibit routine activities conducted in the United States for purposes other than inducing the purchase or sale of the securities being distributed abroad, such as routine advertising and corporate communications.[61] The dissemination of routine information of the character and content normally published by a company, and unrelated to a securities selling effort, generally would not be directed selling efforts under the Regulation. For example, press releases regarding the financial results of the issuer or the occurrence of material events with respect to the issuer generally will not be deemed to be "directed selling efforts."[62]

Similarly, the Regulation is not intended to limit or interfere with news stories or other bona fide journalistic activities, or otherwise hinder the flow of normal corporate news regarding foreign issuers. Access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed need not be limited where the information is made available to the foreign and U.S. press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by U.S. holders in the case of exchange offers. A Preliminary Note to such effect has been added to the Regulation as adopted.[63]

Legitimate selling activities carried out in the United States in connection with an offering of securities registered under the Securities Act or exempt from registration pursuant to the provisions of section 3 or 4 of the Securities Act will not constitute directed selling efforts with respect to offers and sales made under Regulation S.[64]

The Regulation generally will not interfere with activities conducted outside the United States, if such activities are legal and customary in the foreign jurisdiction. Such activities may relate to a foreign distribution [65] or to the ordinary course of an issuer's business. In this regard, activities carried out abroad such as advertising in newspapers or magazines with no general circulation in the United States or granting interviews or conducting promotional seminars outside the United States and not targeted to the United States will not preclude reliance on the Regulation's safe harbor.

The "directed selling efforts" definition does not preclude investigation of investment opportunities offered and sold offshore. Bona fide site visits to real estate, plants, or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates, or a person acting on behalf of any of the foregoing, are not directed selling efforts.[66]

As noted in the Proposals,[67] the scope of directed selling efforts under Regulation S is not coextensive with activities constituting "solicitation," as that term is used in considering the need for registration as a broker-dealer under the Securities Exchange Act of 1934.[68] In a recent Release regarding the applicability of U.S. broker-dealer registration requirements to foreign entities, and adopting Exchange Act Rule 15a–6,[69] the concept of solicitation was defined by the Commission as "including any affirmative effort by a broker or dealer intended to induce transactional business for the broker-dealer or its affiliates." [70] Among the examples of solicitation noted in that Release were efforts to induce a single transaction, telephone calls from a broker-dealer to a customer encouraging use of the broker-dealer to effect transactions, and transmission of information, opinions, or recommendations to particular investors in the United States, whether directed at individuals or groups. While limited activities directed at a single customer or prospective investor may be offers for purposes of Regulation S or solicitation for purposes of Rule 15a–6, they generally will not constitute directed selling efforts for purposes of the Regulation because of their confined effect.

The dissemination in the United States of a broker-dealer's quotations for a security being offered and sold in reliance on the Regulation could be deemed a directed selling effort. Questions regarding this aspect of "directed selling efforts" typically will be decided on an individual interpretive basis.[71] Current U.S. distribution of foreign broker-dealers' quotations by third-party systems, *e.g.*, systems operated by foreign marketplaces or by private vendors, that distribute such quotations primarily in foreign countries will not be deemed directed selling efforts or an offer, provided that: (i) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the systems; and (ii) the issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the systems do not initiate contacts with U.S. persons or

[59] This situation is similar to the safe harbor from sections 2(10) and 5(c) concepts of "offer for sale" and "offer to sell" established in Rule 139 under the Securities Act (17 CFR 230.139) for brokers or dealers participating in a distribution who publish or distribute information, opinions or recommendations about the issuer or any class of its securities.

[60] Such a contact could constitute an offer in the United States. *See infra* text accompanying nn. 67–70.

[61] *Cf.* Securities Act Release Nos. 4697 (May 28, 1964) [29 FR 7317] and 5009 (Oct. 7, 1969) [34 FR 16870], which address the Commission's view that Section 5(c) of the Securities Act is not intended to restrict normal communications between an issuer and its stockholders.

[62] 53 FR at 22667. *See also* Securities Act Release Nos. 3844 (Oct. 8, 1957) [22 FR 8359] and 5009 (Oct. 7, 1969) [34 FR 16870]. However, where a company did not have a history of disseminating routine corporate communications or product advertising and disseminated such information shortly before or during an offshore offering, the activities might constitute directed selling efforts.

[63] *See* Preliminary Note 7 to Regulation S.

[64] For example, legitimate U.S. selling activities made in connection with the sale of securities in compliance with Rule 144A [17 CFR 230.144A], or in a private placement exempt under section 4(2) [15 U.S.C. 77d(2)] or Rule 506 [17 CFR 230.506] generally will not result in directed selling efforts.

[65] Several commenters expressed concern that, given the prohibition against directed selling efforts, U.S. issuers or distributors would be unable to rely upon the Regulation if they initiated sales communications to non-U.S. persons from the United States. The prohibition against directed selling efforts made in the United States does not preclude such activities.

[66] *See* Rule 902 (b)(5).

[67] 53 FR at 22667, n. 84; 54 FR at 30065.

[68] 15 U.S.C. 78 a *et seq.* (the "Exchange Act").

[69] 17 CFR 240.15a–6.

[70] Exchange Act Release No. 27017 (July 11, 1989).

[71] Quotations on the PORTAL system will not be deemed to result in directed selling efforts for purposes of Regulation S.

persons within the United States, beyond those contacts exempted under Rule 15a–6.[72] The direct dissemination of a foreign market maker's quotations to U.S. persons or persons within the United States, such as through a private quotation system controlled by a foreign broker-dealer, will, consistent with Rule 15a-6, be viewed as both an offer and a directed selling effort under Regulation S given that such dissemination is done directly and exclusively for the purpose of inducing purchases of the securities.

2. Issuer Safe Harbor

The issuer safe harbor [73] is available for issuers, distributors, their respective affiliates, and persons acting on behalf of any of the foregoing. The issuer safe harbor distinguishes among three classes of securities, with varying procedural safeguards imposed to have the securities offered come to rest offshore. The criteria used to divide securities into three groups, such as nationality and reporting status of the issuer and the degree of U.S. market interest in the issuer's securities, were chosen because they reflect the likelihood of flowback into the United States and the degree of information available to U.S. investors regarding such securities.

Commenters on the Proposals questioned the treatment of guaranteed debt securities for purposes of the three issuer safe harbor categories. Their concern arises when the guarantees and guaranteed securities would fall into different issuer safe harbor categories by virtue of the differing characteristics of the issuers. Where the securities are fully and unconditionally guaranteed by the parent of the issuer, the status of the parent will govern.[74] Thus, if a foreign subsidiary of a reporting U.S. parent company makes an offering in Europe and Asia of debt securities fully and unconditionally guaranteed by the parent, the securities will fall in the second issuer safe harbor category. In the case of full and unconditional guarantees by multiple parents of an issuer of debt securities, the status of the ultimate parent will govern. For example, if a U.S. company, which is wholly owned by a U.S. subsidiary of a foreign issuer with no substantial U.S. market interest in its debt securities, makes an offering of debt securities fully and unconditionally guaranteed by its direct and indirect parents, the securities will fall in the first category. Debt securities of any issuer fully and unconditionally backed by the full faith and credit of a foreign government, directly or by guarantee, fall into the first category. Generally, other offerings of guaranteed securities will be subject to the most restrictive of the categories applicable to the guaranteed security and any guarantees.

For purposes of applying restricted periods [75] under the issuer safe harbor, convertible securities generally are treated as the security into which they are convertible.[76] However, where the securities are not convertible before any applicable restricted period would have ended if such underlying securities had themselves been offered and sold under Rule 903, the restricted period will be determined by the convertible security. Thus, an offering of convertible debt securities by a foreign issuer with substantial U.S. market interest in its debt and equity securities would fall within the second category of the issuer safe harbor if the debt securities are not convertible for 13 months but would fall within the third issuer safe harbor category if the debt securities were convertible after 11 months.

For purposes of the determination of whether substantial U.S. market interest exists, the measurement is made both by reference to the convertible security and the underlying security.[77] If substantial U.S. market interest exists in either, there is substantial U.S. market interest in the convertible securities.

Questions also have been raised as to the status of unit securities offerings under the issuer safe harbor. For purposes of determining the applicable issuer safe harbor category within Rule 903, the units offering generally would be analyzed as if it were an offering of each security separately and the most restrictive category applicable will govern the units offering. If, however, the securities comprising the units may be separately traded immediately after issuance, to the extent feasible the restrictions of the issuer safe harbor may be applied as if the securities comprising the units were distributed in separate offerings. Where a unit comprised of both debt and equity securities is offered and sold under the third category of the issuer safe harbor, the restricted period applicable to equity will apply to the debt portion unless the securities comprising the unit may be separately traded immediately after issuance, in which case the debt and equity securities have their separate applicable restricted periods.

a. Category 1: Foreign issuers with no substantial U.S. market interest; overseas directed offerings; securities backed by the full faith and credit of a foreign government; employee benefit plans. The first issuer safe harbor category is available for offers and sales of securities of foreign issuers [78] with no "substantial U.S. market interest" for their securities,[79] securities offered and sold in "overseas directed offerings," [80] securities backed by the full faith and credit of a foreign government,[81] and securities offered and sold pursuant to certain employee benefit plans. Securities issued by foreign entities that do not have a substantial U.S. interest in their securities may be expected to flow back or remain in their major or home market, and are not likely to flow into the United States following an offshore offering. Flowback concerns also are limited where securities of a foreign issuer, even with a substantial U.S. market, are offered and sold in an offering directed at residents of a single foreign jurisdiction and conducted in accordance with local laws, and customary local practices and documentation. Flowback concerns are reduced where a U.S. issuer's non-convertible debt securities, asset-backed securities and non-participating preferred stock denominated in a currency other than U.S. dollars are

[72] *See* Rule 902 (b)(6). In the context of the broker-dealer registration requirements, section 15 (a)(1) of the Exchange Act [15 U.S.C. 78*o*(a)(1)], the staff has given assurances that enforcement action for failure to register would not be recommended when market makers' quotations are merely collected and distributed in the United States by a foreign exchange and substantial U.S. contacts or solicitations of U.S. investors are lacking. *See* Exchange Act Release No. 27017 (July 11, 1989) [54 FR 30013, 30018, n. 63 and accompanying text].

[73] Rule 903.

[74] *See* Rule 903(c)(5).

[75] Where a conversion exempt under section 3(a)(9) of the Securities Act [15 U.S.C. 77c(a)(9)] takes place during the restricted period, the securities issued on conversion will be restricted for the remainder of the restricted period. A conversion generally would be exempt from registration under section 3(a)(9) except where compensation is paid on conversion or the security is that of a different issuer. Where the exemption is not available, the same analysis as applies to the exercise of warrants under Regulation S would apply to conversion. *See infra* nn. 126–128 and accompanying text.

[76] *See Sperry Rand Corporation* (Mar. 1, 1974); *cf.* Rule 405 [17 CFR 230.405]. *But see infra* n. 106 and accompanying text regarding treatment of convertible non-participating preferred stock.

[77] *See* Rule 903(c)(1)(i)(D).

[78] The definition of "foreign issuer" in Rule 902(f) is essentially the same as that used in Rule 405 under the Securities Act [17 CFR 230.405].

[79] Rule 902(n). For a discussion of the term "substantial U.S. market interest," *see infra* nn. 86–94 and accompanying text.

[80] Rule 902(j). For a discussion of the term "overseas directed offering," *see infra* nn. 95–99 and accompanying text.

[81] "Foreign government" is defined to include the government of any foreign country or of any political subdivision of a foreign country, provided that such person would qualify to register securities under the Securities Act on Schedule B. *See* Rule 902(e). *See also* Rule 405 under the Securities Act [17 CFR 230.405].

offered and sold in an offering directed at residents of a single foreign jurisdiction, and the offering is conducted in accordance with local laws, and customary local practices and documentation.[82] Securities offered and sold pursuant to employee benefit plans established and administered under foreign law are less likely to flow back into the United States where steps are taken to preclude sales to U.S. residents (other than employees on temporary assignment in the United States) and other conditions specified in the Regulation are met.[83]

Offers and sales of securities included in this category may be made in reliance on the safe harbor without any limitations or restrictions other than the general conditions that the transaction be offshore and that no directed selling efforts be made in the United States.[84] Offers and sales of securities to U.S. investors who are overseas at such time will not preclude reliance on the safe harbor for securities in this category. Of course, trading of a substantial amount of such securities in the United States shortly after they had been offered offshore may indicate a plan or scheme to evade the registration provisions; where a transaction is part of such a plan or scheme, Regulation S is not available.[85]

(1) "Substantial U.S. market interest". The definition of substantial U.S. market has been revised in response to comments on the reproposal. The safe harbor incorporates a reasonable belief standard as to the existence of substantial U.S. market interest; trading is measured under the definition of substantial U.S. market interest on a country-by-country basis, rather than market-by-market; and a percentage test has been added to the debt securities criteria.

A "substantial U.S. market interest" [86] in a class of a foreign issuer's equity securities is defined to exist where at the commencement of the offering (a) the securities exchanges and inter-dealer quotation systems [87] in the United States in the aggregate [88] constitute the single largest market for such securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation [89] or (b) 20 percent or more of the trading in the class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

Commenters on the Reproposing Release expressed concern that defining substantial U.S. market interest by use of percentage and numerical tests would present difficulties because records of trading in an issuer's equity securities may be inaccessible or incomplete. In response to those concerns, the Regulation as adopted permits an issuer to rely upon its reasonable belief as to the existence of a substantial U.S. market interest. Where a foreign or domestic market does not record all trading in a security, only the trading that is recorded (to the extent such information is available to the issuer), is otherwise known to the issuer, or can be reasonably measured or approximated need be considered. Where a substantial market for the issuer's equity securities does not record trading volume, the issuer may reasonably believe there is not a substantial U.S. market interest in that class of securities where less than 20 percent of the class is held of record by persons for whom a U.S. address appears on the records of the issuer, its transfer agent, voting trustee, depositary or person performing similar functions.[90]

A "substantial U.S. market interest" in an issuer's debt securities is dependent upon the aggregation of three types of securities. In addition to traditional debt securities, outstanding non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer (referred to hereinafter as "non-participating preferred stock"), is now included in the measurement of U.S. market interest in debt. The measurement also takes account of securities of a type (referred to hereinafter as "asset-backed securities") that either: (a) Represents an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or (b) are secured by one or more assets or certificates of interest or participation in such assets, and such securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of (a) above, or certificates of interest or participations in assets meeting such requirements. "Assets," as used in the description of asset-backed securities, include: securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

With respect to debt securities, substantial U.S. market interest is measured at the commencement of the offering and is defined as: (A) The issuer's debt securities, its nonparticipating preferred stock and its asset-backed securities, in the aggregate, being held of record [91] by 300

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[82] *See infra* nn. 97–98, 106–108 and accompanying text. Reference throughout this release to local and customary practices and documentation is not intended to mean practices and documentation only as they exist at the time of adoption of the Regulation, without regard to future changes in such practices and documentation. Further, more than one type of practice or documentation may be local and customary in any given jurisdiction.

[83] *See* Rule 903(c)(1)(iv). *See also infra* nn. 100–103 and accompanying text.

[84] Sales of unregistered securities into the United States by dealers during the forty days following the first date upon which the security was bona fide offered to the public would not be exempt under section 4(3) of the Securities Act [15 U.S.C. 77d(3)]. *See* 15 U.S.C. 77d(3)(A).

[85] *See* Preliminary Note 2 to Regulation S.

[86] Rule 902(n).

[87] "Inter-dealer quotation system" means any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers, as defined in Exchange Act Rule 15c2–11(e)(2) [17 CFR 240.15c2–11(e)(2)].

[88] These markets include the U.S. stock exchanges, the National Association of Securities Dealers Automated Quotation System ("NASDAQ"), bid and asked quotations in the current "pink sheets" of the National Quotation Bureau, Inc. and PORTAL.

[89] A reference has been added to clarify that for newly formed entities with no prior fiscal year, trading since the period of incorporation should be considered for purposes of assessing U.S. market interest. Companies with no trading history for the class of equity securities being offered or in their debt, if debt is being offered, will be deemed not to have a substantial U.S. market interest.

[90] Foreign entities that have more than 50 percent of outstanding voting securities held of record by persons with U.S. addresses and that also have either (i) a majority of executive officers or directors who are U.S. citizens or residents; (ii) more than 50 percent of assets in the United States; or (iii) the business administered principally in the United States, do not qualify as foreign issuers. *See* Rule 902(f)(2).

[91] The term "held of record," as used in the definitions of "substantial U.S. market interest" and "foreign issuer," has the meaning set forth in Rule

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or more U.S. persons; (B) $1 billion or more of the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its non-participating preferred stock, and the principal amount or principal balance of its asset-backed securities, in the aggregate, being held of record by U.S. persons; and (C) 20 percent or more of the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its non-participating preferred stock, and the principal amount or principal balance of its asset-backed securities, in the aggregate, being held of record by U.S. persons.[92]

Substantial U.S. market interest in warrants is measured by the level of market interest in the securities to be purchased upon exercise of the warrants.[93] Substantial U.S. market interest in non-participating preferred stock and asset-backed securities is measured by use of the debt securities test in the definition.[94]

Foreign issuers with no "substantial U.S. market interest" are eligible to rely on the first category of the issuer safe harbor, whether or not they are reporting under the Exchange Act, have securities listed on a U.S. exchange or quoted on NASDAQ, or sponsor an American depositary receipt ("ADR") facility.

Commenters on the Reproposing Release also raised questions regarding the responsibility of the parties involved in a distribution for determining whether substantial U.S. market interest exists in the issuer's securities. Absent knowledge to the contrary, distributors may rely upon the written advice of the issuer that it has a reasonable belief that no substantial U.S. market interest exists in its securities.

(2) *"Overseas directed offerings".* In the reproposal, "overseas domestic offerings" were limited to offerings by a foreign issuer directed to its home market. The Regulation as adopted expands the concept to "overseas directed offerings" [95] in response to comments that such offerings do not have significantly more potential for flowback into the United States than the overseas domestic offerings included in the reproposal. "Overseas directed offering" includes two classes of securities offerings. The first class involves offerings of securities of foreign issuers directed to residents of a single country other than the United States made in accordance with local laws, and customary practices and documentation of that country.[96] The second class involves offerings of non-convertible debt securities, asset backed securities and non-participating preferred stock of domestic issuers [97] directed to residents of a single foreign country in accordance with local laws, and customary practices and documentation of that country, provided that the principal and interest of the securities are denominated in a currency other than U.S. dollars and the securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars in a manner that has the effect of converting the securities into U.S. dollar-denominated securities. Related currency or interest rate swap transactions that are commercial in nature will not cause securities denominated in a currency other than the U.S. dollar to be treated as if they were denominated in U.S. dollars.[98]

Of particular importance in the concept of "overseas directed offering" is the requirement that such offerings be "directed" at a single country. Where the foreign issuer, a distributor, any of their respective affiliates, or a person acting on behalf of any of the foregoing, knows or is reckless in not knowing that a substantial portion of the offering will be sold or resold outside that country, the offering will not qualify as an overseas directed offering.[99]

(3) *Employee Benefit Plans.* Offerings of securities to employees of a domestic or foreign issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with laws of a foreign country and customary practices and documentation of such country may be made under the first issuer safe harbor category, provided certain other conditions are met.[100] The other conditions are: (i) The securities are issued in compensatory circumstances for bona fide services which are rendered to the issuer or its affiliates in connection with their businesses and which are not rendered in connection with the offer and sale of securities in a capital-raising transaction;[101] (ii) the interests in the benefit plan are not transferable other than by will or the laws of descent or distribution; (iii) the issuer takes reasonable steps to preclude the offer and sale of interests in the benefit plan or securities under the benefit plan to U.S. residents other than employees on temporary assignment in the United States; and (iv) documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.[102]

The term "employee" as used in the Regulation includes consultants or advisors, provided bona fide services are rendered by such persons to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer or sale of securities in a capital-raising transaction.[103] Further, satisfaction by the issuer of the offshore transaction requirement will not be deemed precluded by a plan trustee's open market purchases in the United States for purposes of obtaining the securities to be offered and sold to employees pursuant to such an employee benefit plan in reliance on the issuer safe harbor.

b. *Category 2: Reporting issuers; non-reporting foreign issuers' debt securities; non-reporting foreign issuers' non-participating preferred stock and asset-backed securities.* Securities of all domestic issuers that file reports under the Exchange Act are subject, under the second safe harbor category,[104] both to

12g5-1 of the Exchange Act [17 CFR 240.12g5-1]. *See* Rule 902[g]. Securities held of record include those known to be held through voting trusts, deposit agreements or similar arrangements.

[92] The 20 percent test has been included to address the concern of commenters that any dollar figure chosen would be too low for larger issuers. The definition of substantial U.S. market interest for debt excludes debt securities exempt under section 3[a][3] of the Securities Act [15 U.S.C. 77c[a][3]]. *See* Rule 902[n][3].

[93] *See* Rule 903[c][1][i][C]. *See supra* n. 77 and accompanying text regarding treatment of convertible securities in connection with a determination of the level of U.S. market interest.

[94] *See* Rule 903[c][1][i][B], 903[c][4]. *See also infra* nn. 106-108 and accompanying text.

[95] Rule 902[j]. *See* Rule 903[c][1][ii].

[96] Rule 902[j][1].

[97] "Domestic issuer" is defined in Rule 902[d]. *See supra* nn. 91-92 and accompanying text for a discussion of asset-backed securities and non-participating preferred stock.

[98] Rule 902[j][2].

[99] *See also* Preliminary Note 2 of the Regulation.

[100] *See* Rule 903[c][1][iv].

[101] Employee benefit plans for purposes of Rule 701 under the Securities Act [17 CFR 230.701] and Form S-8 [*see* Securities Act Release No. 6836 (June 12, 1989) (54 FR 25936)] are the types of plans intended to be covered by this condition.

[102] These conditions are similar to those included in no-action letters relating to Release 4708 and employee benefit plans. *See, e.g., Northern Telecom Limited* (Mar. 2, 1987); *Air Products and Chemicals, Inc./Air Products Ltd.* (May 16, 1985).

[103] Also in response to commenters' concerns, the Regulation provides that an employee benefit plan established and administered in accordance with the law of a foreign country and the customary practices and documentation of such country will not be deemed a U.S. person, even if the plan has a U.S. trustee or administrator. *See* Rule 902 (*o*)[5].

[104] Rule 903[c][2].

the general conditions that an offer or sale be an offshore transaction and that no directed selling efforts may be made in the United States, and to specified selling restrictions. Securities of foreign reporting issuers [105] with substantial U.S. market interest are subject to the same restrictions. The selling restrictions applicable to the second category are designed to protect against an indirect unregistered public offering in the United States during the period the market is most likely to be affected by selling efforts offshore. In the event flowback of reporting issuers' securities does occur after the restricted period, the information relating to such securities publicly available under the Exchange Act generally should be sufficient to ensure investor protection.

The second category also applies to offerings of debt securities of any non-reporting foreign issuer. The inclusion of those offerings in this category reflects the view that offering restrictions applicable to the category provide adequate protection against an indirect U.S. distribution because of the generally institutional nature of the debt market and the trading characteristics of debt securities. Moreover, because debt securities are usually issued in separate classes or series, debt securities can be tracked more easily to detect use of offshore transactions to evade the registration obligation for distributions into the United States.

Reflecting public comment, certain equity securities of nonreporting foreign issuers have been moved to this category from the more restrictive third issuer safe harbor category because of the similarity of the market for these securities to the debt market. Non-participating preferred stock [106] and asset-backed securities [107] of non-reporting foreign issuers are now included in the second category.[108]

Two types of selling restrictions exist for securities in the second category—"transactional restrictions" and "offering restrictions."

(1) *Transactional restrictions.*[109] Transactional restrictions require that the securities sold under the safe harbor prior to the expiration of a 40-day restricted period [110] not be offered or sold to or for the benefit or account of a U.S. person.[111] Persons relying on the second issuer safe harbor category are required to ensure (by whatever means they choose) that any non-distributor to whom they sell securities is a non-U.S. person and is not purchasing for the account or benefit of a U.S. person.[112] Transactional restrictions also require a distributor selling securities to certain securities professionals to send a confirmation or notice to such purchasers advising that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.[113]

(a) *U.S. person.* Rule 902(*o*) contains a definition of the term "U.S. person." Unlike no-action letters pursuant to Release 4708, U.S. residency rather than U.S. citizenship is the principal factor in the test of a natural person's status as a U.S. person under Regulation S.[114] Thus, for example, a French citizen resident in the United States is a U.S. person.[115]

Trusts and estates generally are U.S. persons for purposes of the Regulation if any trustee, executor or administrator is a U.S. person. In response to commenters' concerns with respect to the competitive effects on U.S. professional fiduciaries, the definition of U.S. person has been revised so that an estate with a U.S. professional fiduciary acting as executor or administrator is not deemed a U.S. person if: an executor or administrator who is not a U.S. person has sole or shared investment discretion with respect to the estate assets, and the estate is governed by foreign law. An exclusion from the definition of U.S. person is provided for a trust with a U.S. professional fiduciary acting as trustee, provided a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary (and no settlor if the trust is revocable) is a U.S. person.

With respect to forms of business organization, such as corporations and partnerships, the definition codifies and elaborates on positions set forth in no-action letters. With regard to such entities, the place of incorporation or organization generally controls.[116] The status of subsidiaries and affiliated companies, which generally have separate legal identities, is determined according to the place of incorporation or organization. An entity organized under foreign law by a U.S. person principally for the purpose of investing in unregistered securities is a U.S. person unless organized and owned by accredited investors (as defined in Regulation D) who are not natural persons, estates or trusts.

A branch or agency of a foreign entity is treated as a U.S. person if it is located in the United States. Branches and agencies of U.S. banks and insurance companies located outside the United States are not treated as U.S. persons, if they: (i) Operate for valid business reasons; (ii) are engaged in the banking or insurance business; and (iii) are subject to substantive local banking or insurance regulation.[117]

With respect to fiduciary accounts (other than trusts and estates), the definition generally treats the person with the investment discretion as the buyer; therefore the status of that person governs. Thus, where a U.S. person has discretion to make investment decisions for the account of a non-U.S. person, the account is treated as a U.S. person.

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[105] "Reporting issuer" is defined in Rule 902 (*f*). Issuers furnishing material to the Commission pursuant to Rule 12g3-2(b) of the Exchange Act [17 CFR 240.12g3-2(b)] are not reporting issuers.

[106] Rule 903(c)(4)(i). Convertible non-participating preferred stock will be subject to the same restrictions as equity unless it cannot be converted prior to the end of any restricted period that would be applicable to equity of the foreign issuer, in which case it would be treated as non-convertible non-participating preferred stock.

[107] Pass-through asset-backed securities and other asset-backed securities are treated the same under the safe harbor. Such pass-through securities have not been treated the same as debt securities for certain other purposes under the federal securities laws, while other asset-backed securities have been treated the same as debt.

[108] Rule 903(c)(4)(ii). Regulation S would not exempt a foreign issuer of asset-backed securities from the prohibitions of section 7(d) of the 1940 Act to the extent such foreign issuer is an investment company. *See Touche Remnant* (pub. avail. Aug. 27, 1984) and Securities Act Release No. 6862 (April 23, 1990) (text accompanying nn. 63–64).

[109] Non-compliance with the transactional restrictions precludes reliance on the safe harbor by the person who failed to meet the requirement, its affiliates and persons acting on their behalf. Such non-compliance does not affect the availability of the safe harbor for other persons. *See infra* n. 143 and accompanying text.

[110] Upon expiration of any restricted period, securities (other than unsold allotments) will be viewed as unrestricted.

[111] Rule 903(c)(2)(iii). "U.S. person" is defined in Rule 902(*o*). Offers and sales of securities to U.S. persons who are distributors are permitted; it is not the Commission's intent to prevent U.S. persons from participating in an offshore offering as distributors.

[112] Safe harbor protection would not be available where offers and sales were made nominally to non-U.S. persons to evade the restrictions.

[113] Rule 903(c)(2)(iv). Securities professionals receiving such a confirmation who are not distributors will not thereby be required to deliver confirmations or to comply with the offering restrictions.

[114] *E.g., Executive Management, Inc.* (Oct. 28, 1983).

[115] While transient visitors not resident in the United States are not U.S. persons, offers and sales to transients in the United States are transactions in the United States and may not be part of an offering relying on the safe harbors of Regulation S. *But see supra* n. 102 and accompanying text.

[116] *See, e.g., Goldman, Sachs & Co.* (Oct. 3, 1985).

[117] *See Foreign Agencies and Branches of United States Banks and Insurance Companies* (Feb. 25, 1988).

Conversely, where a non-U.S. person makes investment decisions for the account of a U.S. person, that account is not treated as a U.S. person. Several exceptions from that general principle, however, are established in the definition.

In light of the serious competitive disadvantages that might be faced by U.S. professional fiduciaries, the Commission is excepting from the definition of U.S. person U.S. professional fiduciaries acting with discretion for the accounts of persons (other than trusts and estates) who are not themselves U.S. persons.[118] Consistent with the *Baer Securities Corporation* letter,[119] U.S. professional fiduciaries acting with investment discretion are deemed U.S. persons for purposes of Regulation S only when they are acting for the account of U.S. persons.

Certain multinational organizations and their agencies, affiliates and pension plans are specifically excluded from the definition of "U.S. person." The definition also excludes all similar multinational entities.[120] The staff interpretive letter process will be available for future questions regarding exclusion of specific multinational organizations.

The reproposal would not have permitted offers and sales to such professional fiduciaries and multinational entities to be made inside the United States. Numerous commenters objected to the fact that, contrary to the *Baer* letter, sales to such persons would have to comply with the offshore transaction requirement and the restriction against directed selling efforts in the United States. In response to those comments, the definition of "directed selling efforts" has been revised to exclude contacts with U.S. professional fiduciaries acting with investment discretion for the accounts of non-U.S. persons, in their capacities as such, and with multinational organizations excluded from the definition of U.S. person.[121] Offers and sales to such persons also are deemed to be made in offshore transactions.[122] Nevertheless, if a U.S. professional fiduciary were offered and sold securities for accounts of non-U.S. persons in reliance upon the safe harbor but placed such securities in accounts held for the benefit of U.S. persons, that fiduciary could be deemed an underwriter for purposes of the Securities Act and may have distributed unregistered securities in violation of section 5.

(b) *Measurement of the restricted period.* The 40-day restricted period begins to run on the later of the date of the closing of the offering or the date the first offer of the securities to persons other than distributors is made.[123]

In the case of a continuous offering, the Commission originally proposed that the restricted period would not commence until completion of the distribution, as determined and certified by the lead managing underwriter. Other than as discussed below, this position has been retained.

The reproposal provided that in the case of offerings of non-convertible debt securities issued in clearly distinct and identifiable tranches or issues, the 40-day restricted period would commence upon completion of the distribution of that tranche or issue, as certified by the lead managing underwriter or person performing similar functions. Public comments on the reproposal objected that a further requirement, suggested in the text of the release, that 40 days would have to pass from the sale of the tranche to the sale of another identifiable tranche, would effectively foreclose reliance on Regulation S for the conduct of medium-term note ("MTN") programs [124] outside the United States. In such programs, sales of identifiable tranches may not be separated by 40 days from the sale of another such tranche. Recognizing the legitimacy of this offering technique, the Commission agrees that the commencement of a restricted period should not be delayed because of the coincidence of two independent sales in such a continuous offering within a period of 40 days. As adopted, the Regulation provides that in such continuous debt offerings, the restricted period will run from the managing underwriter's certification that the distribution of an identifiable tranche of securities has been completed. Under this method, the Commission believes that continuous offerings, including MTN programs, could be conducted in accordance with Regulation S.

Commenters on the Reproposing Release also expressed concern that warrants offered pursuant to the second or third issuer safe harbor categories could never be offered or sold to U.S. persons absent registration or an available exemption from registration.[125] To address those concerns, the Regulation as adopted provides that the restricted period of the underlying securities will coincide with the restricted period for the warrants if certain procedures are followed to ensure that the underlying securities are not sold to U.S. persons except in a registered or exempt transaction.[126] The required procedures are threefold. First, the warrants must contain a legend stating that they and the underlying securities have not been registered under the Securities Act, and that the warrants may not be exercised by or on behalf of U.S. persons unless registered or an exemption from registration is available.[127] Second, the person exercising the warrant must be required either to certify that it is not a U.S. person and that the warrants are not being exercised on behalf of a U.S. person, or to provide an opinion of counsel that the securities have been registered or that an exemption from registration is available. Finally, procedures must be adopted to ensure that the warrants may not be exercised in the United States and the underlying securities may not be delivered to the United States,[128] absent registration or an available exemption from registration.

(c) *ADRs and the restricted period.* No substantive changes have been made from the reproposal with respect to ADRs. Like the reproposal, the Regulation as adopted focuses on the sale by a depositary of ADRs

[118] *See* Rule 902(*o*)(2).

[119] *Baer Securities Corporation* (Oct. 12, 1979).

[120] Rule 902(*o*)(7).

[121] Rule 902(b)(3).

[122] Rule 902(i)(3).

[123] *See* Rule 902(m).

[124] "Medium-term note" programs are one technique for the continuous offering of debt securities. The reference to "medium term" has no necessary relation to the maturity or other commercial terms of the securities sold. Instead a medium-term note program is a facility allowing the issuance of debt securities of varying maturities as dictated by market demand and other financial considerations. *See* Slonaker and Wiltshire, *Innovative Debt Securities*, 20 Rev. Sec. & Comm. Reg. 89, 91–93 (1987).

[125] The Commission noted in the Proposing Release that warrants could be issued in reliance on the Regulation, but so long as the warrants were exercisable, a continuous offering of the underlying securities would be ongoing, and thus the warrants would be subject to the restricted period of the underlying securities, which would not begin to run until the warrants were no longer exercisable because certification that the distribution of the underlying securities had ended could not be given until then. *See* 53 FR at 22668, n.93 and accompanying text.

[126] The procedures are similar to those described to the Division of Corporation Finance in the *Sears Overseas Finance N.V.* (June 11, 1982) no-action letter.

[127] When no physical instrument is delivered to represent the warrants, another procedure, such as delivery of a notice, must be used to inform the recipient of the information that otherwise would be contained in the legend.

[128] Certain U.S. professional fiduciaries and multinational organizations excluded from the definition of U.S. person (*see* Rule 902(*o*) (2) and (7)) may exercise such warrants and receive such warrants in the United States notwithstanding this requirement. *See* Rule 902(m)(3). *See also* Rule 902(i)(3).

representing securities of the class distributed. Such sales are permitted if (1) the ADRs represent securities acquired by the depositary prior to the distribution, or (2) the depositary determines by examination of the certificate or other evidence that the security to be deposited is not subject to a restricted period and was neither borrowed nor deposited with the intention that it be replaced with securities subject to the restricted period. Whether any sales may be made prior to the expiration of a restricted period depends in part on what steps the issuer of deposited securities is willing or able to take to identify the securities it is distributing. Issuance of ADRs in exchange for underlying securities and withdrawal of deposited securities by ADR holders is not precluded by the safe harbor provisions.

A single method of identifying the securities in question is not specified because a particular method may not be consistent with applicable rules in all countries. Examples of possible methods of identifying newly distributed securities include the underlining of dates, the use of different colors for the certificates, the use of legends, the use of identified certificate numbers, and the coding of securities by the transfer agent.

(d) *Confirmations.* Until the expiration of the restricted period, another condition of the second issuer safe harbor category is that a distributor selling securities to a distributor, dealer, or person receiving remuneration with respect to the securities, prior to the expiration of the restricted period, send a confirmation or other notice stating that the purchaser is subject to the same restrictions on offers and sales as the distributor.[129] As in the Reproposing Release, the confirmation need only note the applicable restrictions, rather than seek to create a binding agreement to abide by the restrictions. The Regulation is conditioned on transmission, rather than receipt or delivery of the confirmation, to facilitate distributors' compliance burden.

In light of the movement towards paperless markets, the phrase "confirmation or other notice," accommodates paperless transactions. The "other notice" could include a notice given on screen rather than on paper or a notice given on the telephone, provided that the seller kept written records of notices given. In response to commenters' concerns, the Commission has determined that screen notices may be given in summary form, provided all subscribers to the screen-based system are sent, prior to first use and periodically thereafter, a key that indicates what each summary notice represents and includes the full text of each notice.

(2) *Offering restrictions.* "Offering restrictions" are procedures that must be adopted with regard to the entire offering by the issuer, distributors, their respective affiliates, and all persons acting on behalf of any of the foregoing, in order for a transaction to be in compliance with the second or third categories of the issuer safe harbor. Failure to implement the offering restrictions precludes the availability of the issuer safe harbor for all parties.[130] In effect, offering restrictions are procedures set up by such persons to ensure compliance with the transactional restrictions, particularly the restrictions on offer or sale of the securities to or for the account or benefit of U.S. persons. When the issuer, a distributor, an affiliate of either, or a person acting on behalf of any of the foregoing, is the seller of securities, that person is in a position to ensure, and should ensure, that procedures designed to discourage flowback are used with respect to the entire offering.

The offering restrictions, which are the same for both the second and third issuer safe harbor categories, have been modified from those developed in no-action letters under Release 4708. The offering restrictions require distributors, who by definition are participating in the distribution pursuant to a contractual arrangement, to contract that all their offers and sales of the securities will be made in accordance with the safe harbor (or pursuant to registration under the Securities Act or an exemption therefrom).[131]

The issuer, distributors, their respective affiliates, and persons acting on behalf of any of the foregoing, must ensure that certain materials disclose that the securities have not been registered and may not be offered or sold in the United States or to a U.S. person (other than a distributor), unless registered or an exemption from registration is available. Disclosure of the restrictions must appear in any prospectus, offering circular or other document (other than a press release) used in connection with the distribution prior to the expiration of the restricted period. All advertisements relating to the securities are subject to that requirement. The disclosure may appear in summary form on prospectus cover pages and in advertisements.[132]

c. *Category 3: Non-reporting U.S. issuers; equity offerings by non-reporting foreign issuers with substantial U.S. market interest.* All securities not covered by the prior two categories fall into this residual category, which is subject to procedures intended to protect against an unregistered U.S. distribution where there is little (if any) information available to the marketplace about the issuer and its securities and there is a significant likelihood of flowback. This category includes securities of non-reporting U.S. issuers and equity securities of non-reporting foreign issuers with substantial U.S. market interest in their equity securities.

As in the case of securities of reporting issuers, offerings of securities in this category are subject to the two general conditions and to offering and transactional restrictions. Offering restrictions that must be adopted for offerings of these securities are the same as for offerings of securities of reporting issuers. In contrast to offerings in the second category, more restrictive transactional restrictions to prevent flowback are applicable.

In essence, the restrictive procedures are similar to those that evolved under the no-action letters involving Release 4708. The procedures adopted are essentially those included in the Reproposing Release. These distinguish between debt and equity securities, recognizing that debt securities are generally sold in institutional markets and that the likelihood of flowback is less than in the case of common equity. The category includes a restricted period of one year for equity securities and forty days for debt securities. Two types of a non-reporting U.S. issuers' securities, which would include non-convertible, nonparticipating preferred stock and asset-backed securities, will be subject to the same restrictions as debt securities in the third category, including a 40-day restricted period rather than a one-year restricted period. Offerings of securities of a non-reporting foreign issuer of those two types have been added to the second issuer safe harbor category.[133]

Offerings of equity securities in this category are subject to restrictions similar to those afforded no-action treatment in *InfraRed Associates, Inc.*[134] Prior to the expiration of the one-

[129] The same confirmation delivery requirement is included in the third issuer safe harbor category. *See* Rule 903 (c)(2)(iv) and (c)(3)(iv). *See supra* n. 113.

[130] *See infra* n. 142 and accompanying text.

[131] Rule 902(h)(1).

[132] Rule 902(h)(2).

[133] *See* Rule 903(c)(4). *See also supra* nn. 106–108 and accompanying text.

[134] *InfraRed Associates, Inc., supra* n. 16.

year restricted period, the securities may not be sold to U.S. persons or for the account or benefit of U.S. persons (other than distributors). Purchasers of the securities (other than distributors) are required to certify that they are not U.S. persons and are not acquiring the securities for the account or benefit of a U.S. person other than persons who purchased securities in transactions exempt from the registration requirements of the Securities Act.[135] Such purchasers are also required to agree only to sell the securities in accordance with the registration provisions of the Securities Act or an exemption therefrom, or in accordance with the provisions of the Regulation.

With respect to equity securities of domestic issuers, the safe harbor requires that a legend be placed on the shares stating that transfer is prohibited other than in accordance with the Regulation. The safe harbor further requires that any issuer, by contract or a provision in its bylaws, articles, charter or comparable document, refuse to register any transfer of equity securities not made in accordance with the provisions of the Regulation. Where bearer securities are being sold, or foreign law prevents an issuer from refusing to register securities transfers, use of reasonable procedures, such as a legend, will suffice to satisfy the requirement designed to prevent transfer of equity securities other than in accordance with the Regulation.

Purchasers of debt securities offered under the third issuer safe harbor category (other than distributors) are subject to different restrictions than equity purchasers under this category. Prior to the expiration of the forty-day restricted period, the securities may not be sold to U.S. persons or for the account or benefit of U.S. persons (other than distributors). The debt securities must be represented by temporary global securities not exchangeable for definitive securities until expiration of the restricted period. Upon expiration, persons exchanging their temporary global security for the definitive security are required to certify beneficial ownership by: a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Securities Act.[136]

Distributors selling equity or debt securities prior to the expiration of the restricted period are required to send a confirmation or other notice to purchasers who are distributors, dealers or persons receiving remuneration in connection with the sale. The notice must state that the purchaser is subject to the same restrictions on offers and sales as the distributor. Non-distributors are not required to send such a confirmation or notice.

3. Resale safe harbor

Under the reproposal, the resale safe harbor was available for offers and sales by all persons other than an issuer, a distributor, their respective affiliates, and any person acting on behalf of any of the foregoing.[137] As suggested by several commenters, the Regulation as adopted also specifically allows certain officers and directors of issuers and distributors to rely upon the resale safe harbor. Officers and directors of such persons who are affiliates would otherwise be unable to rely upon the resale safe harbor. As adopted, an officer or director of an issuer or distributor is eligible to rely upon the resale safe harbor if the sole reason such officer or director may be deemed an affiliate is by virtue of position, provided no special selling compensation is paid in connection with the offers and sales by such officer or director and the general conditions (and conditions imposed upon dealers and certain securities professionals, as applicable) are satisfied. Special selling compensation includes any selling concession, fee or other remuneration, other than the usual and customary broker's commissions that would be received by persons executing such sales as agents.[138] Of course, where such officer or director is being used as a conduit to offer and sell securities in reliance on the resale safe harbor by persons ineligible to rely thereon, the resale safe harbor will not be available.[139]

Persons other than: (1) Dealers and persons receiving a selling concession, fee or other remuneration in respect of the securities offered or sold, which may include sub-underwriters (all referred to herein as "securities professionals"), and (2) affiliated officers and directors eligible to rely upon the resale safe harbor, may resell any securities in reliance on this safe harbor, with no restrictions other than the general conditions that the offer and sale be made in an offshore transaction (including offers and sales in a designated offshore securities market not pre-arranged with a buyer in the United States) and without directed selling efforts within the United States.

Resales by securities professionals also are subject to the offshore transaction requirement and the prohibition on directed selling efforts (and the conditions applying to affiliated officers and directors, as applicable). In addition, if the securities being resold are not in the first issuer safe harbor category and the resale is made prior to the expiration of any applicable restricted period, neither the securities professional nor any person acting on its behalf may knowingly offer or sell to a U.S. person.[140] Further, if the selling securities professional or a person acting on its behalf knows the purchaser of the securities is a securities professional, the seller is required to send a confirmation or other notice of the applicable restrictions to the purchaser.[141]

The resale safe harbor is available for the resale offshore of any securities, whether or not acquired in an offshore transaction under Regulation S. Resales pursuant to Rule 904 of securities originally placed privately will not affect the validity of the private placement exemption relied upon by the issuer.

4. Safe harbor protections

If an issuer, distributor, any of their respective affiliates (other than officers and directors relying on the resale safe harbor), or any person acting on behalf of any of the foregoing: (1) Fails to comply with the offering restrictions; or (2) engages in a directed selling effort in the United States, the Rule 903 safe harbor is unavailable to any person in connection with the offering of securities.[142] If the issuer, a distributor, any of such respective affiliates, or any person acting on behalf of any of the foregoing, fails to comply with any other

[135] Such a certification could be made, for example, by a qualified institutional buyer who purchased in accordance with Rule 144A.

[136] Certification as to beneficial ownership made by a financial institution or clearing organization through which the beneficial owner holds the securities will suffice for purposes of this safe harbor.

[137] Rule 904. Several commenters on the reproposed Regulation stated that the resale safe harbor might be interpreted as somehow altering the availability of Sections 4(1) and 4(3) of the Securities Act [15 U.S.C. 77d(1), 77d(3)] for the resale of securities. The Regulation does not affect the availability of the exemptions contained in those sections.

[138] *See* Rule 904(c)(2).

[139] Thus, securities being offered in a distribution by the issuer could not be resold under Rule 904 by an officer or director during the distribution or during any applicable restricted period.

[140] The safe harbor does not place a duty of inquiry on the securities professional.

[141] Paralleling the issuer safe harbor, the confirmation requirement in the resale safe harbor requires transmission rather than receipt or delivery.

[142] Resales by officers and directors in compliance with Rule 904 will not affect the availability of Rule 903.

requirement of the issuer safe harbor,[143] the safe harbor is not available for any offer or sale in reliance thereon made by the person failing to comply, its affiliates or persons acting on their behalf. The availability of Rule 903 for other persons' offers and sales of securities is unaffected.

Under the reproposal, the failure to comply with the conditions, other than the offering restrictions and the restrictions on directed selling efforts in the United States, would have precluded reliance upon the safe harbor only for non-complying offers and sales. Under Rule 903 as adopted, reliance upon the safe harbor for all offers and sales made by a non-complying person and its affiliates is precluded as an appropriate incentive to comply fully with the conditions of the safe harbor.

The availability of the Rule 904 resale safe harbor generally is unaffected by the actions of the issuer, distributor, their respective affiliates (other than certain officers and directors relying upon Rule 904), or persons acting on behalf of any of the foregoing. An offer or sale of securities made in compliance with the provisions of Rule 904 is within the safe harbor, notwithstanding non-complying offers or resales by other unaffiliated persons not acting on behalf of the seller.[144]

As Preliminary Note 2 states, the Regulation is not available to any transaction or series of transactions that, although in technical compliance with the rules, is part of a plan or scheme to evade the registration provisions of the Securities Act. Thus, for example, a participant in a distribution, regardless of whether it literally takes all steps required for reliance upon the protection of the Regulation, does not have the protection of the Regulation if it knows or is reckless in not knowing that a person to whom it sells securities in reliance upon the Regulation will not comply with the requirements. Clearly, if an underwriter were told by a dealer to whom it intended to sell securities in reliance upon Rule 903 that the dealer had a customer in New York waiting for the securities, that underwriter would not be able to rely upon the protection of the Rule in connection with its sale to that dealer, even if the underwriter complied with all the Regulation's requirements. The same would be true if the underwriter knew or was reckless in not knowing that the dealer to whom it intended to sell had consistently sold to U.S. residents in violation of resale restrictions in other offerings made pursuant to the safe harbor provisions of the Regulation. If, on the other hand, an underwriter sold to a dealer and the dealer sold to a customer in the United States, and the underwriter did not know and was not reckless in failing to know that the non-conforming sale would occur, the underwriter would not lose the protection of the safe harbor.

C. Interaction With Other Securities Act Provisions

1. Contemporaneous U.S. and Offshore Offerings

Offshore transactions made in compliance with Regulation S will not be integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously. Resales of securities offered and sold in offshore transactions pursuant to Rule 144A are consistent with Rule 904. Of course, the securities sold pursuant to Rule 144A would be restricted securities.

2. Revisions to Rules

References to Release 4708 in certain rules under the Securities Act are being revised to make reference to Regulation S. Preliminary Note 7 to Regulation D [145] stated: "Offers and sales of securities to foreign persons made outside the United States effected in a manner that will result in the securities coming to rest abroad generally need not be registered." A reference to Release 4708 and a discussion of its interaction with Regulation D followed that statement. That Preliminary Note is being amended to delete the reference to Release 4708, refer to this Release and affirm the principle that the Regulation may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States.

The Note to Rule 502(a) of Regulation D [146] states that transactions meeting the requirements of an exemption generally will not be integrated with simultaneous offerings being made outside the United States in a manner that the securities come to rest abroad. That statement was followed by a reference to Release 4708. The discussion of the non-integration policy and the reference to Release 4708 are being replaced by discussion of and references to Regulation S.

D. Interaction With Trust Indenture Act

The Trust Indenture Act of 1939 ("Trust Indenture Act") [147] applies generally to the offer and sale of debt securities if the means or instruments of interstate commerce or the mails are used. In such cases, the securities must be issued under an indenture which conforms to the requirements of and has been qualified under the Trust Indenture Act, unless an exemption is available.[148]

The staff has granted numerous no-action letters involving offers and sales of securities otherwise than under a qualified indenture, where the securities involved were being offered and sold in reliance upon Release 4708.[149] The Commission is continuing this position with respect to offers and sales of securities made under the safe harbor provisions of Rules 903 and 904 in Regulation S. Specifically, the Commission will not take any enforcement action under the Trust Indenture Act where an offer and sale of securities is made otherwise than under a qualified indenture, if the offer and sale are made in compliance with Rule 903 or 904.[150]

E. Interaction With Investment Company Act

Consistent with the proposals, the Regulation is available for offers and sales of securities of any investment company that is not registered or required to register under the 1940 Act.[151] As originally proposed, the

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[143] The confirmation requirement is included in the transactional restrictions, rather than the offering restrictions, in response to commenters' concern that otherwise the failure to provide a simple confirmation would make the issuer safe harbor unavailable for the entire offering.

[144] Affiliates of the seller (other than the issuer or a distributor, in the case of an officer or director thereof selling in reliance on the resale safe harbor) will be deemed to be acting on behalf of the seller.

[145] Preliminary Note 7 to 17 CFR 230.501–230.508.

[146] Note to 17 CFR 230.502(a).

[147] 15 U.S.C. 77aaa–bbbb.

[148] Section 304(a)(6) of the Trust Indenture Act [15 U.S.C. 77ddd(a)(6)] contains an exemption for certain securities issued or guaranteed by a foreign government or a subdivision, department, municipality, agency or instrumentality thereof. Section 304(d) [15 U.S.C. 77ddd(d)], authorizes the Commission, on application by an issuer and after opportunity for a hearing, to exempt by order any security of a person organized under the laws of a foreign government or political subdivision thereof, if certain conditions are met.

[149] *E.g., goldman, Sachs & Co.* (Oct. 3, 1985).

[150] The Commission has submitted a proposal to Congress which, if enacted, would comprehensively modernize the Trust Indenture Act. Under the proposal, the Commission's exemptive power under section 304(d) would be broadened to permit adjustment of the Act's requirements to particular needs when their application would impose undue restrictions, and would thus allow for formalization of the positions taken in the Commission's no-action letters.

[151] A U.S. investment company that, using any means of interstate commerce, sold its shares to foreigners generally would be required to register under the 1940 Act. *See* section 7 of the 1940 Act, 15 U.S.C. 80a–7.

Regulation was not applicable to offers and sales of securities issued by investment companies registered or required to register under the 1940 Act. In the Proposing Release, the Commission set forth several reasons for drawing a distinction between investment company and other securities, but solicited comment as to whether the Regulation should be revised to allow its use for offers and sales of investment company securities.[152]

Several commenters expressed the view that Regulation S should be extended to offers and sales of securities issued by registered closed-end investment companies ("closed-end funds"). They stated that the Commission's concern regarding redemptions is not applicable to offerings by closed-end funds, which do not issue redeemable securities; that closed-end fund offerings have more in common with offerings of industrial issuers than offerings of mutual funds; that the substantive rules under the Securities Act governing the registration of offerings by closed-end funds should be similar to those governing industrial company offerings; and that offering documents for offshore sales would contain adequate disclosures due to the applicability of the antifraud provisions of the Securities Act.

As adopted, the Regulation is available with respect to offers and sales of securities issued by closed-end funds registered under the 1940 Act. Because such investment companies do not file reports under the Exchange Act, offerings of their securities generally will fall into the third category for purposes of the issuer safe harbor.[153] In addition, the Commission requests comment as to whether to extend the application of the Regulation to offers and sales of securities issued by registered mutual funds and unit investment trusts ("UIT"). Comment is requested with respect to whether the concerns outlined in Release 5068 and the Proposing Release continue to be significant in connection with offerings of such mutual fund and UIT securities and, if so, how they can be addressed. Because mutual funds and UITs issue redeemable securities, the concern addressed in Release 5068 regarding redemptions appears to be valid. Could the concern about redemptions be addressed adequately by relying on the antifraud provisions of the Securities Act and any disclosure requirements of the foreign country in which the securities are sold? Would application of the Regulation meet the legitimate expectations of investors and foreign regulators when U.S. mutual funds are offered and sold abroad? Comment is also specifically requested regarding whether the restrictions and procedures required by the third category of the issuer safe harbor of the Regulation are appropriate for offers and sales of investment company securities, or whether additional, fewer or different restrictions and procedures are warranted. For example, should offering documents be required to include: a description of the substantive requirements of the 1940 Act; a description of the ways in which the redemption procedures of mutual funds and UITs differ from those of similar investment vehicles subject to regulation in the country where the offer is made; and risk factor disclosure? Also, should delivery of a disclosure document be required in connection with foreign offers and sales of such mutual fund and UIT securities even if not required in the jurisdiction where the offer and sale are made? Finally, comment is requested as to whether any rules or guidelines would be appropriate for the use of advertising and sales literature in connection with offshore offers and sales of mutual fund and UIT securities under the Regulation.

[152] The reasons set forth in the Proposing Release for making this distinction were: to ensure that prospective investors receive disclosure about matters subject to substantive regulation under the 1940 Act (which in turn would effectuate the policies of the 1940 Act); to address the expectations of investors that the activities of a U.S. investment company subject to registration and regulation under the 1940 Act would also be subject to Securities Act registration (and because investors in such investment companies, in effect, elect to invest in the U.S. capital markets); and to protect the U.S. securities markets as a whole by ensuring that foreign investors will not seek redemptions which could require the sale of portfolio securities because of a later realization that they had been inadequately informed about their investment. *See* Securities Act Release No. 6779, *supra* n. 1, at nn. 74–75 and accompanying text. Those reasons had initially been set forth in Securities Act Release No. 33–5068 (June 23, 1970) [35 FR 12103] ("Release 5068"), in which the Commission discussed the procedures to be used by open-end investment companies ("mutual funds") in connection with overseas offerings of their securities.

[153] In lieu of filing reports under sections 13 and 15(d) of the Exchange Act, investment companies file semi-annual reports on Form N–SAR. *See* Rule 30a–1 under the 1940 Act [17 CFR 270.30a–1]. Form N–SAR is not designed to provide the market with the same stream of information as the periodic reports required of non-investment companies by the Exchange Act. While investment companies are required to provide annual reports to their shareholders, there is no mechanism for assuring that the information contained in these reports is made generally known to the markets. Accordingly, offerings of securities of registered closed-end funds generally may be made only under the third issuer safe harbor category of the Regulation (Rule 903(c)(3)).

IV. Cost-Benefit Analysis

It appears to the Commission that, while it is possible that some additional costs to issuers, distributors or other sellers may result from structuring a transaction in accordance with the requirements of a safe harbor or the General Statement, such costs will be outweighed by the savings of the costs of registration and the benefit derived from assurance that registration need not be undertaken. In addition, the Commission believes that the streamlined method to assure that the securities come to rest outside the United States will also reduce costs.

V. Availability of Final Regulatory Flexibility Analysis

A Final Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act has been prepared with respect to the Regulation and the amendments to Regulation D. A summary of a corresponding Initial Regulatory Flexibility Analysis was included in the Proposing Release, and a summary of a revised corresponding Initial Regulatory Flexibility Analysis was included in the Reproposing Release. Members of the public who wish to obtain a copy of the Final Regulatory Flexibility Analysis should contact Anita Klein, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

VI. Summary of Initial Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603 has been prepared concerning the proposal to extend Regulation S to registered mutual funds and UITs. This analysis notes that the proposal is intended to provide such mutual funds and UITs with the same guidance concerning extraterritorial offerings of securities that is provided by Regulation S to other issuers.

This proposal will not result in any significant increase in reporting, recordkeeping or compliance requirements. No alternatives to this proposal consistent with its objectives were found. Small entities, like any other issuers, would be entitled to the benefits of the guidance and safe harbor provided by extension of Regulation S.

A copy of the analysis may be obtained by contacting Kenneth J. Berman, Office of Disclosure and Adviser Regulation, Division of Investment Management, U.S. Securities

and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

VII. Paperwork Reduction

OMB Number: 3235-0357. Expires April 19, 1993. Estimated average burden hours per response—1.0.

VIII. Effective Date

Regulation S and the amendments to Regulation D shall be effective immediately upon publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publication for, *inter alia*, "a substantive rule which grants or recognizes an exemption or relieves a restriction" and "interpretative rules and statements of policy." 5 U.S.C. 553(d) (1) and (2).

IX. Statutory Basis and Text Of Regulation and Regulation Amendments

This Regulation and the amendments to Regulation D are being adopted pursuant to sections 2, 3, 4, and 19 of the Securities Act of 1933.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations, Organization and functions.

17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of Regulation and Regulation Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION REQUESTS

1. The authority citation for part 200, subpart A continues to read in part as follows:

Authority: Secs. 19, 23, 48 Stat. 85, 901, as amended; sec. 20, 49 Stat. 833; sec. 319, 53 Stat. 1173; secs. 38, 211, 54 Stat. 841, 855; sec. 308, 101 Stat. 1254 (15 U.S.C. 77s, 78d-1, 78d-2, 78w, 79t, 77sss, 80a-37, 80b-11), unless otherwise noted. * * *

2. Section 200.30-1 is amended by adding new paragraph (j) as follows:

§ 200.30-1 Delegation of authority to Director of Division of Corporation Finance.

* * * * *

(j) With respect to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and Regulation S thereunder (§ 230.901 *et seq.* of this chapter), and in consultation with the Director of the Division of Market Regulation, to designate any foreign securities exchange or non-exchange market as a "designated offshore securities market" within the meaning of Rule 902(a) (§ 230.902(a) of this chapter).

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for part 230 is amended by adding the following citations: (Citations before * * * indicate general rulemaking authority).

Authority: Sec. 19, 48 Stat 815, as amended; 15 U.S.C. 77s * * * Sections 230.901-230.904 and amendments to Regulation D also issued under Sections 2, 3 and 4, 15 U.S.C. 77b, 77c, and 77d.

* * * * *

2. By revising Preliminary Note 7 to Regulation D, §§ 230.501 through 230.508, to read as follows:

Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933

Preliminary Notes

* * * * *

7. Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States.

3. By revising the Note to paragraph (a) of § 230.502 to read as follows:

§ 230.502 General conditions to be met.

* * * * *

(a) * * *

Note: The term "offering" is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this § 230.502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (i.e. are considered "integrated") depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S. See Release No. 33-6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

(a) Whether the sales are part of a single plan of financing;

(b) Whether the sales involve issuance of the same class of securities;

(c) Whether the sales have been made at or about the same time;

(d) Whether the same type of consideration is being received; and

(e) Whether the sales are made for the same general purpose.

See Release 33-4552 (November 6, 1962) [27 FR 11316].

* * * * *

4. By adding new Regulation S, consisting of Preliminary Notes and §§ 230.901-230.904, to read as follows:

Regulation S—Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933

Preliminary Notes

Preliminary Notes

1. The following rules relate solely to the application of Section 5 of the Securities Act of 1933 (the "Act") [15 U.S.C. 77e] and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the "Exchange Act"), whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any applicable exemption from the registration requirements of the Act.

6. Regulation S is available only for offers and sales of securities outside the United States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Nothing in these rules precludes access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and

meetings with company press spokespersons in which an offshore offering or tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers.

8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*] (the "1940 Act").

§ 230.901 General statement.

For the purposes only of section 5 of the Act (15 U.S.C. § 77e), the terms "offer," "offer to sell," "sell," "sale," and "offer to buy" shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

§ 230.902 Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Designated Offshore Securities Market.* "Designated offshore securities market" means:

(1) The Eurobond market, as regulated by the Association of International Bond Dealers; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bourse de Bruxelles; the Frankfurt Stock Exchange; The Stock Exchange of Hong Kong Limited; The International Stock Exchange of the United Kingdom and the Republic of Ireland, Ltd.; the Johannesburg Stock Exchange; the Bourse de Luxembourg; the Borsa Valori di Milan; the Montreal Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange; and

(2) Any foreign securities exchange or non-exchange market designated by the Commission. Attributes to be considered in determining whether to designate such a foreign securities market, among others, include:

(i) Organization under foreign law;

(ii) Association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;

(iii) Oversight by a governmental or self-regulatory body;

(iv) Oversight standards set by an existing body of law;

(v) Reporting of securities transactions on a regular basis to a governmental or self-regulatory body;

(vi) A system for exchange of price quotations through common communications media; and

(vii) An organized clearance and settlement system.

(b) *Directed Selling Efforts.* (1) "Directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S. Such activity includes placement of an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Notwithstanding paragraph (b)(1) of this section, placement of an advertisement required to be published under United States or foreign law, or under rules or regulations of a United States or foreign regulatory or self-regulatory authority, shall not be deemed "directed selling efforts," provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under § 230.903(c) (2) or (3)) absent registration or an applicable exemption from the registration requirements.

(3) Notwithstanding paragraph (b)(1) of this section, contact with persons excluded from the definition of "U.S. person" pursuant to paragraph (o)(7) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (o)(2) of this section, solely in their capacities as holders of such accounts, shall not be deemed "directed selling efforts."

(4) Notwithstanding paragraph (b)(l) of this section, a tombstone advertisement in a publication with a general circulation in the United States shall not be deemed "directed selling efforts," provided:

(i) The publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;

(ii) Such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under § 230.903(c) (2) or (3)) absent registration or an applicable exemption from the registration requirements; and

(iii) Such advertisement contains no more information than:

(A) The issuer's name;

(B) The amount and title of the securities being sold;

(C) A brief indication of the issuer's general type of business;

(D) The price of the securities;

(E) The yield of the securities, if debt securities with a fixed (non-contingent) interest provision;

(F) The name and address of the person placing the advertisement, and whether such person is participating in the distribution;

(G) The names of the managing underwriters;

(H) The dates, if any, upon which the sales commenced and concluded;

(I) Whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and

(J) Any legend required by law or any foreign or U.S. regulatory or self-regulatory authority.

(5) Notwithstanding paragraph (b)(1) of this section, bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing shall not be deemed "directed selling efforts."

(6) Notwithstanding paragraph (b)(1) of this section, distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries will not be deemed "directed selling efforts" if:

(i) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and

(ii) The issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under Rule 15a-6 under the Exchange Act (17 CFR 240.15a-6).

(c) *Distributor.* "Distributor" means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S.

(d) *Domestic Issuer.* "Domestic issuer" means any issuer other than a foreign issuer.

(e) *Foreign Government.* "Foreign government" means the government of any foreign country or of any political subdivision of a foreign country, provided that such person would qualify to register securities under the Act on Schedule B.

(f) *Foreign Issuer.* (1) "Foreign issuer" means any issuer that is:

(i) A foreign government;

(ii) A national of any foreign country; or

(iii) A corporation or other organization incorporated or organized under the laws of any foreign country.

(2) Notwithstanding paragraph (f)(1) of this section, an issuer other than a foreign government shall not be deemed a "foreign issuer" if:

(i) More than 50 percent of the outstanding voting securities of such issuer is held of record by persons for whom a U.S. address appears on the records of the issuer, its transfer agent, voting trustee, depositary, or person performing similar functions; and

(ii) Any of the following factors are present:

(A) The majority of the executive officers or directors of the issuer are U.S. citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

(C) The business of the issuer is administered principally in the United States.

(g) *Held of Record.* "Held of record" has the meaning assigned to that term in Rule 12g5–1 under the Exchange Act (17 CFR 240.12g5–1).

(h) *Offering Restrictions.* "Offering restrictions" means:

(1) Each distributor agrees in writing that all offers and sales of the securities prior to the expiration of the restricted period specified in § 230.903(c) (2) or (3), as applicable, shall be made only: in accordance with the provisions of § 230.903 or § 230.904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

(2) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the restricted period specified in § 230.903(c) (2) or (3), as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration requirements of the Act is available. Such statements shall appear:

(i) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(ii) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(iii) In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(i) *Offshore Transaction.* (1) An offer or sale of securities is made in an "offshore transaction" if:

(i) The offer is not made to a person in the United States; and

(ii) Either:

(A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

(B) For purposes of:

(*1*) Section 230.903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

(*2*) Section 230.904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (a) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(2) Notwithstanding paragraph (i)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in "offshore transactions."

(3) Notwithstanding paragraph (i)(1) of this section, offers and sales of securities to persons excluded from the definition of "U.S. person" pursuant to paragraph (o)(7) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (o)(2) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in "offshore transactions."

(j) *Overseas Directed Offering.* "Overseas directed offering" means:

(1) An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or

(2) An offering of non-convertible debt securities, or securities described in § 230.903(c)(4) (i) or (ii), of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.

(k) *Publication With a General Circulation in the United States.* (1) "Publication with a general circulation in the United States" means any publication that:

(i) Is printed primarily for distribution in the United States; or

(ii) Has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue.

(2) Notwithstanding paragraph (k)(1) of this section, only the U.S. edition of any publication printing a separate U.S. edition will be deemed a publication with a general circulation in the United States if:

(i) Such publication, without consideration of its U.S. edition, would not meet the requirements of paragraph (k)(1) (i) or (ii) of this section; and

(ii) The U.S. edition itself meets the requirements of paragraph (k)(1) of this section.

(l) *Reporting Issuer.* "Reporting issuer" means an issuer other than an investment company registered or required to register under the 1940 Act that:

(1) Has a class of securities registered pursuant to section 12(b) or 12(g) of the Exchange Act (15 U.S.C. § 78*l*(b) or § 78*l*(g)) or is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78*o*(d)); and

(2) Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78*o*(d)) for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (or for

such shorter period that the issuer was required to file such material).

(m) *Restricted Period.* "Restricted period" means a period that commences on the later of the date upon which the securities were first offered to persons other than distributors in reliance upon this Regulation S or the date of closing of the offering, and expires a specified period of time thereafter; *Provided, however*, that all offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the restricted period; provided, further, that in a continuous offering, the restricted period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions; provided, further, that in a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the restricted period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; provided, further, that in a continuous offering of securities to be acquired upon the exercise of warrants, the restricted period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, if the following requirements are satisfied:

(1) Each warrant bears a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;

(2) Each person exercising a warrant is required to give:

(i) Written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or

(ii) A written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and

(3) Procedures are implemented to ensure that the warrant may not be exercised within the United States and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of "offshore transaction" pursuant to paragraph (i)(3) of this section, unless registered under the Act or an exemption from such registration is available.

(n) *Substantial U.S. Market Interest.* (1) "Substantial U.S. market interest" with respect to a class of an issuer's equity securities means:

(i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or

(ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(2) "Substantial U.S. market interest" with respect to an issuer's debt securities means:

(i) Its debt securities and the securities described in § 230.903(c)(4) (i) and (ii), in the aggregate, are held of record by 300 or more U.S. persons;

(ii) $1 billion or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.903(c)(4)(i), and the principal amount or principal balance of its securities described in § 230.903(c)(4)(ii), in the aggregate, is held of record by U.S. persons; and

(iii) 20 percent or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.903(c)(4)(i), and the principal amount or principal balance of its securities described in § 230.903(c)(4)(ii), in the aggregate, is held of record by U.S. persons.

(3) Notwithstanding paragraph (n)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by section 3(a)(3) of the Act (15 U.S.C. § 77c(a)(3)).

(o) *U.S. Person.* (1) "U.S. person" means:

(i) Any natural person resident in the United States;

(ii) Any partnership or corporation organized or incorporated under the laws of the United States;

(iii) Any estate of which any executor or administrator is a U.S. person;

(iv) Any trust of which any trustee is a U.S. person;

(v) Any agency or branch of a foreign entity located in the United States;

(vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership or corporation if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501(a) under the Act (§ 230.501(a) of this chapter)) who are not natural persons, estates or trusts.

(2) Notwithstanding paragraph (o)(1) of this section, any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States shall not be deemed a "U.S. person."

(3) Notwithstanding paragraph (o)(1) of this section, any estate of which any professional fiduciary acting as executor or administrator is a U.S. person shall not be deemed a U.S. person if:

(i) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(ii) The estate is governed by foreign law.

(4) Notwithstanding paragraph (o)(1) of this section, any trust of which any professional fiduciary acting as trustee is a U.S. person shall not be deemed a U.S. person if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person.

(5) Notwithstanding paragraph (o)(1) of this section, an employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country shall not be deemed a U.S. person.

(6) Notwithstanding paragraph (o)(1) of this section, any agency or branch of a U.S. person located outside the United States shall not be deemed a "U.S. person" if:

(i) The agency or branch operates for valid business reasons; and

(ii) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located.

(7) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans shall not be deemed "U.S. persons."

(p) *United States.* "United States" means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

§ 230.903 Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.

An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if it satisfies the following requirements:

(a) *Requirement of Offshore Transaction.* The offer or sale shall be made in an offshore transaction.

(b) *Prohibition Against Directed Selling Efforts.* No directed selling efforts shall be made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing.

(c) *Additional Conditions*—(1) *Securities of Certain Foreign Issuers; Overseas Directed Offerings; Securities Backed By the Full Faith and Credit of Foreign Government; Employee Benefit Plan Securities.* An offer or sale of securities may be made with no conditions other than those set forth in § 230.903 (a) and (b) if:

(i) The issuer is a foreign issuer that reasonably believes at the commencement of the offering that:

(A) There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

(B) There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

(C) There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

(D) There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

(ii) The securities are offered and sold in an overseas directed offering;

(iii) The securities are backed by the full faith and credit of a foreign government; or

(iv) The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:

(A) The securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer and sale of securities in a capital-raising transaction;

(B) Any interests in the plan are not transferable other than by will or the laws of descent or distribution;

(C) The issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and

(D) Documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.

(2) *Securities of Any Reporting Issuers; Debt Securities of Non-Reporting Foreign Issuers; Non-Participating Preferred Stock and Asset-Backed Securities of Non-Reporting Foreign Issuers.* An offer or sale of securities may be made, provided that the conditions set forth in § 230.903 (a) and (b) are met and provided that:

(i) The issuer is a reporting issuer or the securities are debt securities of a foreign issuer;

(ii) Offering restrictions are implemented;

(iii) The offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(iv) Each distributor selling securities to a distributor, a dealer, as defined in section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day restricted period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(3) *Securities of Any Issuer.* An offer or sale of securities of any issuer may be made, provided that the conditions set forth in § 230.903 (a) and (b) are met and provided that:

(i) Offering restrictions are implemented;

(ii) In the case of debt securities:

(A) The offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day restricted period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(iii) In the case of equity securities:

(A) The offer or sale, if made prior to the expiration of a one-year restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The offer or sale is made pursuant to the following conditions:

(*1*) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(*2*) The purchaser of the securities (other than a distributor) agrees to resell such securities only in accordance with the provisions of this Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration;

(*3*) The securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S; and

(*4*) The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S; *Provided, however,* that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (c)(3)(iii)(B)(*3*) of this

section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation; and

(iv) Each distributor selling securities to a distributor, a dealer (as defined in section 2(12) of the Act (15 U.S.C. 77b(12))), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day restricted period in the case of debt securities or a one-year restricted period in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(4) *Non-Participating Preferred Stock and Asset-Backed Securities.* Notwithstanding paragraphs (c)(1) through (c)(3) of this section, only the requirements of paragraph (c) of this section applicable to the offer and sale of debt securities of an issuer need be satisfied with respect to the offer and sale by such issuer of the following securities:

(i) Non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; or

(ii) Securities of a type that either:

(A) Represents an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(B) Is secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (c)(4)(ii)(A) of this section, or certificates of interest or participations in assets meeting such requirements.

For purposes of paragraph (c)(4)(ii) of this section, the term "assets" means: securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(5) *Guaranteed Securities.* Notwithstanding paragraphs (c)(1) through (c)(4) of this section, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of paragraph (c) of this section that are applicable to the offer and sale of the guarantee need be satisfied with respect to the offer and sale of the guaranteed debt securities.

§ 230.904 Resales.

An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if it satisfies the following requirements:

(a) *Requirement of Offshore Transaction.* The offer or sale shall be made in an offshore transaction.

(b) *Prohibition Against Directed Selling Efforts.* No directed selling efforts shall be made in the United States by the seller, an affiliate, or any person acting on their behalf.

(c) *Additional Conditions.* In addition to the conditions set forth in §§ 230.904 (a) and (b) of this section, the following requirements are satisfied:

(1) *Resales by Dealers and Persons Receiving Selling Concessions.* In the case of an offer or sale of securities of any issuer prior to the expiration of the restricted period specified in § 230.903 (c) (2) or (3), as applicable, by a dealer, as defined in section 2(12) of the Act [15 U.S.C. 77b(12)], or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) Neither the seller nor any person acting on his behalf knows that the offeree or buyer of the securities is a U.S. person; and

(ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(12) of the Act (15 U.S.C. 77b(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the restricted period only: in accordance with the provisions of this Regulation S; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by Certain Affiliates.* In the case of an offer or sale of securities of any issuer by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

Dated: April 24, 1990.

By the Commission.

Jonathan G. Katz.

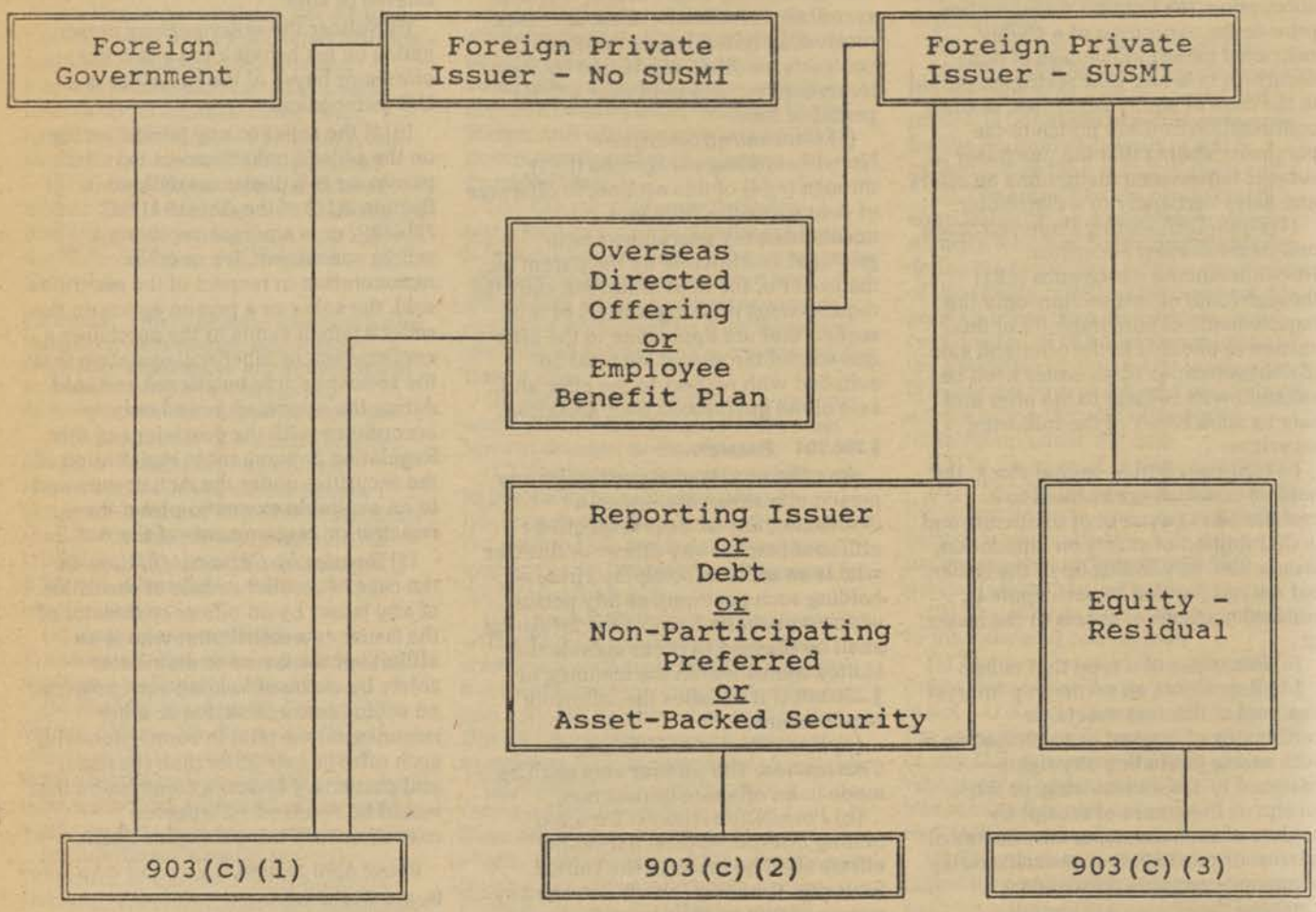
Secretary.

Note: The release contains explanatory charts illustrating the operation of Regulation S. The charts will not be reproduced in the Code of Federal Regulations.

BILLING CODE 8010-01-M

APPENDIX A

903(c) CHART
FOREIGN ISSUERS

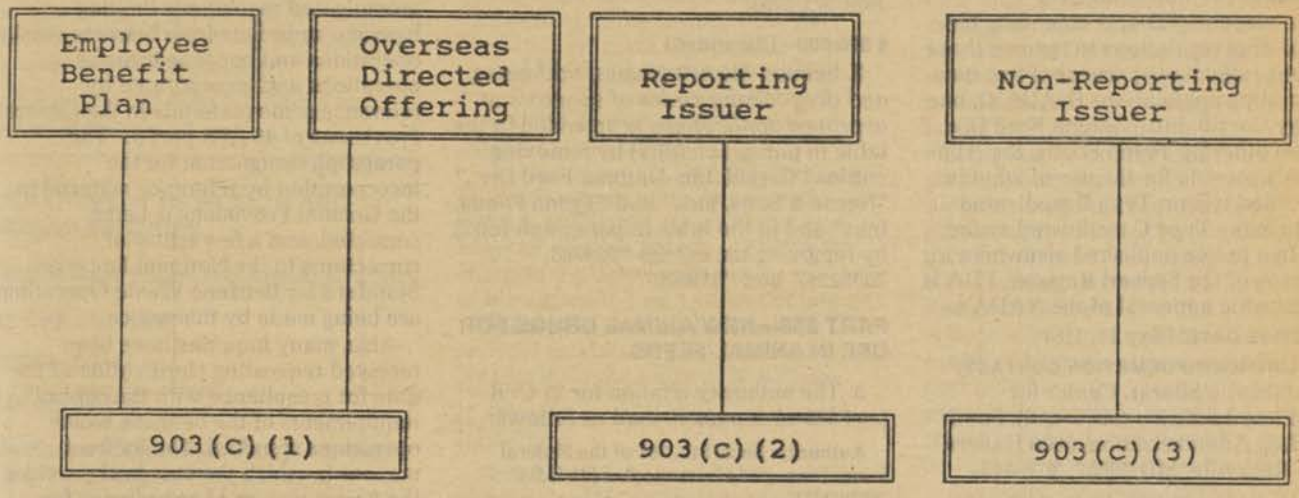


SUSMI is substantial U.S. market interest, as defined in Rule 902(n).

Note: This chart has been prepared to give a convenient overview of Regulation S. Because the chart necessarily abbreviates terms and otherwise simplifies the requirements of the safe harbor, it should not be used as a substitute for analysis of an offering under the Regulation itself.

APPENDIX B

903(c) CHART
DOMESTIC ISSUERS



Note: This chart has been prepared to give a convenient overview of Regulation S. Because the chart necessarily abbreviates terms and otherwise simplifies the requirements of the safe harbor, it should not be used as a substitute for analysis of an offering under the Regulation itself.

[FR Doc. 90-10077 Filed 5-1-90; 8:45 am]
BILLING CODE 8010-01-C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 558

Animal Drugs, Feeds, and Related Products; Tylosin

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to remove those portions reflecting approval of two new animal drug applications (NADA's), one held by Cargill, Inc.-Nutrena Feed Div., and the other by Tyson Foods, Inc. The NADA's provide for the use of what is now called tylosin Type B medicated feed to make Type C medicated swine feed. In a notice published elsewhere in this issue of the **Federal Register**, FDA is withdrawing approval of the NADA's.

EFFECTIVE DATE: May 14, 1990.

FOR FURTHER INFORMATION CONTACT: Mohammad I. Sharar, Center for Veterinary Medicine (HFV–216), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4093.

SUPPLEMENTARY INFORMATION: In a notice published elsewhere in this issue of the **Federal Register**, FDA is withdrawing approval of NADA 102–717, held by Cargill, Inc.-Nutrena Feed Div., and NADA 121–290, held by Tyson Foods. Both NADA's provide for the use of what is now called tylosin Type B medicated feed for making Type C medicated swine feed. This document removes the sponsor entries in 21 CFR 510.600 (c)(1) and (c)(2) for Cargill, Inc.-Nutrena Feeds Div., and Tyson Foods, Inc. Neese & Sons, Inc., the original sponsor, is removed from the sponsor entries in 21 CFR 510.600 (c)(1) and (c)(2) because it was never removed after the transfer of its NADA to Cargill, Inc. (October 5, 1979; 45 FR 57389). § 558.625 (b)(47) and (b)(75) (21 CFR 558.625 (b)(47) and (b)(75)) are removed and reserved to reflect the withdrawal of these NADA's.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 558 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 512, 701, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 376).

§ 510.600 [Amended]

2. Section 510.600 *Names, addresses, and drug labeler codes of sponsors of approved applications* is amended in the table in paragraph (c)(1) by removing entries "Cargill, Inc.-Nutrena Feed Div.," "Neese & Sons, Inc.," and "Tyson Foods, Inc.," and in the table in paragraph (c)(2) by removing the entries "024761," "035221," and "039502".

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

3. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: Secs. 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b, 371).

§ 558.625 [Amended]

4. Section 558.625 Tylosin is amended by removing and reserving paragraphs (b)(47) and (b)(75).

Dated: April 26, 1990.

Richard H. Teske,

Deputy Director, Center for Veterinary Medicine.

[FR Doc. 90–10158 Filed 5–1–90; 8:45 am]

BILLING CODE 4160–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[AD–FRL–3761–6]

National Emission Standards for Hazardous Air Pollutants; Benzene Emissions From Chemical Manufacturing Process Vents, Industrial Solvent Use, Benzene Waste Operations, Benzene Transfer Operations, and Gasoline Marketing System; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; Correction.

SUMMARY: This notice corrects errors and makes clarifications in the regulatory text of the General Provisions and the final National Emission Standard for Benzene Waste Operations which appeared in the **Federal Register** on March 7, 1990 (55 FR 8292).

FOR FURTHER INFORMATION CONTACT: Ms. Shirley Tabler at (919) 541–5256, Standards Development Branch, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: On March 7, 1990 (55 FR 8292), EPA promulgated regulations limiting benzene emissions from benzene waste operations and benzene transfer operations and incorporated by reference some materials in the General Provisions of 40 CFR part 61. The paragraph designation for the incorporation by reference material in the General Provisions is being corrected, and a few editorial corrections to the National Emission Standard for Benzene Waste Operations are being made by this notice.

Also, many inquiries have been received requesting clarification of the date for compliance with the control requirements of the benzene waste operations standard. The indirect manner in which the standard provides the 2-year waiver of compliance for installation of controls has created confusion regarding the compliance date. Consequently, EPA is clarifying that existing sources, as provided by the statute, need not comply until 90 days after the effective date of the standard, and that sources needing to install controls need not come into compliance until 2 years from the effective date. Thus, the compliance date becomes March 7, 1992. Paragraph (b) of § 61.342 is therefore revised to require compliance with control requirements by March 7, 1992. This change is solely intended to clarify the compliance date and does not alter the control requirements.

Dated: April 24, 1990.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation.

The following corrections are being made in FRL 3706–1; National Emission Standards for Hazardous Air Pollutants; Benzene Emissions from Chemical Manufacturing Process Vents, Industrial Solvent Use, Benzene Waste Operations, Benzene Transfer Operations, and Gasoline Marketing System published in the **Federal Register** on March 7, 1990 (55 FR 8292).

1. The amendatory instruction 2, on page 8341, column 1, is corrected to read "Section 61.18 is amended by adding paragraph (d) to read as follows:"